SUPREME COURT, U. S.

APPENDIX.

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Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 208

UNIVERSAL BUILDERS, INC., ET AL.,
Petitioners,

vs.

SIDNEY AND JULIA CLARK, ET AL.,
Respondents.

APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

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APPENDIX A.

CONTRACT BUYERS LEAGUE, an unincorporated voluntary association, et al., Plaintiffs, v. F & F INVESTMENT et al., Defendants.	No. 69 C 15. United States District Court N. D. Illinois, E. D.

May 21, 1969.

OPINION.

WILL, District Judge.

Plaintiffs, suing as a class, seek relief with respect to contracts for the sale of used residential property in the City of Chicago. Their complaint contains five counts. The first alleges violation of the Civil Rights Act of 1866, 42 U. S. C. §§ 1981, 1982, 1983, 1985(3), and of the Thirteenth and Fourteenth Amendments of the Constitution of the United States. Counts two and three allege, respectively, violations of the federal antitrust laws and of the antitrust laws of the State of Illinois. Count four of the complaint alleges violation of the federal securities laws. Count five alleges violation of the Illinois common law regarding fraud, usury and unconscionable contracts.

This Court has previously determined that under Rule 23 of the Federal Rules of Civil Procedure, plaintiffs can maintain this action as a class action; and the Court has

defined the plaintiff class, subject to future revision and refinement, to be composed of negroes who, since January 1, 1952, have entered into installment contracts for the purchase of used residential real estate in the City of Chicago.[1] The determination that a class action is appropriate was based on the recognition that the common questions of law and fact "predominate" over the individual questions. The essence of this complaint is that violations of law resulted from defendants' concerted exploitation of a condition of *de facto* racial segregation existing in the City of Chicago. Thus, the Court found that common questions of law and fact "predominate" within the terms of Rule 23 because it is alleged that the illegal advantage secured under any one contract depended on, was complemented by, and resulted from a concert and pattern of discriminatory activity including other similar contracts.

The Motions to Dismiss.

By way of motions to dismiss each and every count of the complaint, defendants have now challenged the sufficiency of the allegations.

Before proceeding with the required determination, it should be noted at the outset that when considering a motion to dismiss, a district court must consider all the allegations of fact contained in the complaint and it is uniformly recognized that when a court is making this determination, the complaint must be liberally construed.[2]

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1. Contract Buyers League v. F. & F. Investment, 69 C 15, (N. D. Ill. March 29, 1969).

2. In language characteristic of the determination of a motion to dismiss, the Seventh Circuit Court of Appeals has said, "* * * on a motion to dismiss, a complaint should be construed in the light most favorable to plaintiff with all doubts resolved in his favor; and in view of what is alleged, with all allegations well pleaded being taken as true, if it can reasonably be conceived that the plaintiff can make a case upon trial which would entitle him to

Count I—The Civil Rights Act of 1866, and the Thirteenth and Fourteenth Amendments.

The First count of the complaint relates essentially to the allegations, here taken as admitted for purposes of the motions to dismiss, that defendants exploited a system of *de facto* racial segregation that existed in the City of Chicago, and that by taking advantage of the scarcity of housing for negroes in the City of Chicago, defendants have secured unlawful advantage in the contracts executed by plaintiffs. As described in the complaint, the scheme of exploitation often included obtaining purchase money mortgages based on false and excessive appraisals of used residential property. The essence of the scheme is alleged to have been the purchase of residential properties from white homeowners and the resale, often in the nature of quick "turn-around" transactions, at greatly inflated prices to negro purchasers, who were disadvantaged by the system of *de facto* segregation and the resulting shortage of housing for negroes in Chicago. The terms of the contracts, especially the price, are alleged to represent unlawful profit gained through this pattern of exploitation.

The complaint also alleges in Count I a separate aspect of discriminatory activity. It alleges that some defendants amplified and fostered the *de facto* segregation on which the contracts depended. The complaint asserts that some of the defendants engaged in what is popularly known as "blockbusting," that some of the defendants stimulated and preyed on racial bigotry and fear by initiating and encouraging rumors that negroes were about to

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some relief the complaint should not be dismissed." Jung v. K & D. Mining Co., 260 F. 2d 607, 608 (7th Cir. 1958).

See also, United States v. Howell, 318 F. 2d 162, 166 (9th Cir. 1963); Thomas v. Atlantic Coast Line R. Co., 201 F. 2d 167, 170 (5th Cir. 1953); Cool v. International Shoe Co., 142 F. 2d 318, 320 (8th Cir. 1944).

move into a given area, that all non-negroes would leave, and that the market values of properties would descend to "panic prices" with residence in the area becoming undesirable and unsafe for non-negroes. The complaint thus charges not only that defendants exploited the existing condition of *de facto* segregation, but that by prompting and encouraging a stampede of white sellers, some defendants extended and developed the underlying inequity of segregation that was the breeding ground for their discriminatory profit.

Section 1982 of the Civil Rights Act of 1866 provides that:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

In Jones v. Alfred H. Mayer Co., 392 U. S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968), the Supreme Court of the United States declared the constitutionality and determined the scope of Section 1982. Beginning its opinion with the sum and substance of its determination, the Court stated,

> We hold that § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment. *Id.* at 413, 88 S. Ct. at 2189.

The manner of discrimination specifically involved in *Jones* was the refusal to sell a home to an individual solely on the ground of the individual's race. In the instant case, the discrimination alleged is the sale of used residential property to negroes at higher prices and on more burdensome terms than similar property is sold to whites. Defendants contend that this difference in fact is a difference in kind under the law, that the Supreme Court's con-

clusion as to the import of Section 1982 is therefore not applicable to this case.

But the language and logic of *Jones* and the constitutional application that the Supreme Court regarded as the source of the Civil Rights Act of 1866 must be equally applicable to the discrimination alleged in this case. The Court found that the legislative history of the 1866 Act demonstrated the Congressional intent to ensure that the former slaves could participate fully in a national economy. It was the Court's conclusion that the existence of a black market distinct from a white market was the *de facto* vestige of what the Congress in 1866 intended to abolish as a critical means of making the black man a free man. The conviction recognized was that the obliteration of the social system where one man was the slave or another required as a fundamental matter that our economy be undifferentiated as to the race of a man. The Court thus understood Section 1982 as implementing the Thirteenth Amendment "to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." *Id.* at 443, 88 S. Ct. at 2205.

The Court did point out that § 1982 was limited to activity directly covered by the express terms of the Section. The Court thus stated, "at the outset, it is important to make clear precisely what this case does *not* involve," and went on to say that § 1982 "does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling. * * * It does not refer explicitly to discrimination in financing arrangements or in the provision of brokerage services." *Id.* at 413, 88 S. Ct. at 2189. Of course, the alleged blockbusting and discriminatory lending in the instant case do not fall within the express terms of § 1982. However, the basic claim in this lawsuit clearly does. The basic activity

is the purchase of property. Blockbusting and discriminatory lending are alleged to be additional activities, part and parcel of the alleged conspiracy, which extended the scope and impact of the allegedly discriminatory sale and purchase.

Defendants *in terrorem* point to what they suppose to be the incredible consequences of a holding that Section 1982 bars the sale of residential property to negroes at a higher price because of their race. Defendants contend that this holding would mean that "every non-white citizen has a cause of action maintainable in Federal Court to either rescind or reform each and every transaction involving a purchase or leasing of either *real* or *personal* property by the simple allegation that he was charged more than a white person *would have been* charged or that he received less favorable terms and conditions than would have been given to a white person."

For purposes of a motion to dismiss, and considering that any such allegation would be subject, as any allegation, to the test of proof on trial, defendants are correct. Moreover, the converse is also true. Every white citizen may allege a cause of action on the ground that he was charged more or received less favorable terms than would have been given to a black person.[2] The Supreme Court noted that the defendant in *Jones* similarly pointed to "the revolutionary implications of so literal a reading of § 1982." *Id.* at 422, 88 S. Ct. at 2194. The Supreme Court responded by stating, "our examination of the relevant history, however, persuades us that Congress meant exactly what it said." *Id.* at 422, 88 S. Ct. at 2194.

What was true in *Jones* is true here also—that defendants call "revolutionary" what is simply a denial of their assumption that there is a necessary sanctity in the *status quo*. Defendants present the discredited claim that it is

necessarily right for a businessman to secure profit wherever profit is available, arguing specifically with respect to this case that they did not create the system of *de facto* segregation which was the condition for the alleged discriminatory profit. But the law in the United States has grown to define certain economic bounds and ethical limits of business enterprise. Developed areas of the law such as are invoked under the fraud and antitrust counts of this complaint are characteristic examples. So we are hearing an old and obsolete lament. For it is now understood that under § 1982 as interpreted in Jones v. Alfred H. Mayer Co. there cannot in this country be markets or profits based on the color of a man's skin.

Defendants also suggest that this case cannot involve "actual" discrimination, but only "hypothetical" discrimination. Their notion is that because the complaint does not state that defendants ever made sales of similar property to whites as they sold to plaintiffs, the possibility of discrimination somehow disappears.

We first point out what should be obvious—that allegations are not "hypotheticals." The claim that defendants sold to negroes at a higher price than similar property would be sold to whites will be subject to proof on trial. Second, and most important, defendants' position elaborated is that if property is sold to a negro above what can be demonstrated to be the usual market price, there can be no discrimination unless the same seller actually sells to whites at a lower price. It should be clear that in law this result would be obnoxious. In logic, it is ridiculous. It would mean that the 1866 Civil Rights Act, which was created to be an instrument for the abolition of discrimination, allows an injustice so long as it is visited exclusively on negroes.

In sum, then, there is no reason to distinguish a refusal

to sell on the ground of race and a sale on discriminatory prices and terms. Count I of this complaint states a claim under Section 1982 of the Civil Rights Act of 1866 as understood in Jones v. Alfred H. Mayer Co., and the motions to dismiss must be denied with respect to Count I of the complaint. Because the motion is thus denied, we need not reach the question of whether the complaint states a claim under the other grounds asserted in Count I.

Count II—The Federal Antitrust Laws.

In Count II of the complaint, plaintiffs allege that defendants have violated Section 1 of the Sherman Act, 15 U. S. C. § 1, through the pattern of activity alleged in Count I; and plaintiffs add allegations that there has been continuing action and agreement by defendants and their co-conspirators to fix the prices on the sale of real estate to plaintiffs at approximately $5,000 to $15,000 per unit above the fair market value of each unit. The particularization of the antitrust violation also includes allegations that defendants and their co-conspirators arranged the elimination of price competition in the sale and financing of real estate properties and in the discounting of installment contracts entered into by plaintiffs.

There is no question, and defendants do not dispute, that the activities alleged can violate the antitrust laws if the scope of such activities is sufficient to bring them within the ambit of federal regulation. The only substantial issue raised by the motion to dismiss Count II of the complaint is, therefore, whether the combination and conspiracy complained of is alleged to be "in restraint of interstate commerce" as the nature of interstate restraint has been understood in the application of the federal antitrust laws.

It is established under the decided cases that, depending upon the particular circumstances, a business activity con-

ducted solely intrastate may result in an interstate restraint that is violative of the federal antitrust laws. The Supreme Court recognized this manner of violation in Mandeville Island Farms v. American Crystal Sugar Co., 334 U. S. 219, 68 S. Ct. 996, 92 L. Ed. 1328 (1948) where the Court generalized the test to be applied, stating,

> For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others become remediable under the Act's prescribed methods, including the treble damage provision. *Id.* at 234, 68 S. Ct. at 1005.

Or again, in United States v. Women's Sportswear Manufacturers Ass'n, 336 U. S. 460, 69 S. Ct. 714, 93 L. Ed. 805 (1949), the Court said,

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze. *Id.* at 464, 69 S. Ct. at 716.

A substantial body of precedent now describes the various circumstances where the effect of local activity on interstate commerce is sufficient to be violative of the federal antitrust laws. *See, e.g.*, United States v. Employing Plasterers' Association, 347 U. S. 186, 74 S. Ct. 452, 456, 98 L. Ed. 618 (1954); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F. 2d 732 (9th Cir. 1954); United States v. Chrysler Corp. Parts Wholesalers, 180 F. 2d 557 (9th Cir.

1950); United States v. Detroit Sheet Metal & Roofing Contractors Ass'n, 116 F. Supp. 81 (E. D. Mich. 1953).

In this Count of the complaint, plaintiffs state a number of respects in which they suggest that the activities of defendants and their co-conspirators adversely affected interstate commerce. While the relation asserted is general, under the liberal construction of allegations being challenged by a motion to dismiss, plaintiffs have alleged the necessary interstate effect.

Some of the more substantial of the allegations establishing the requisite effect are that the installment contracts are significantly related to an interstate market for the discount and sale of installment contracts, and that the alleged improper financing of these properties would effect the interstate market for such financing. Also of note is the alleged background of *de facto* segregation and the existence of a limited supply of housing for negroes, indeed, a separate market for the negro buyer. In view of this background and plaintiffs' allegations that negroes have decided whether or not to move to Chicago on the basis of the prices of real estate in Chicago, there is reasonable possibility that the alleged fixing of prices of Chicago real estate could substantially affect the buying and selling of real estate in areas outside Illinois—as for instance in the proximate areas of Indiana. Thus, as is here indicated, the alleged interstate effects are not absurd nor patently false. Accordingly, the motions to dismiss Count II of the complaint must be denied.

COUNT III—THE ILLINOIS ANTITRUST LAWS.

In view of the conclusion that this complaint states a federal claim, it is clear that this Court has pendant jurisdiction to hear the cause alleged under the antitrust laws of the State of Illinois, specifically Chapter 38, Section

60-3(1) (a), Illinois Revised Statutes, 1967. That a cause is stated is apparent through a comparison of the allegation of price-fixing and the specific language of the statute invoked.[3] And the pendant jurisdiction of this Court is equally clear. The principle that a federal court may retain jurisdiction of a state cause depending on its relation to the federal cause alleged in the same suit was clarified by the Supreme Court of the United States in United Mine Workers of America v. Gibbs, 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). The Court held that "[t]he state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantially of the federal issues, there is *power* in federal courts to hear the whole." *Id.* at 725, 86 S. Ct. at 1138. The court went on to emphasize the discretionary character of the power and that the federal court should look to "considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726, 86 S. Ct. at 1139. The similarity of the federal and state causes of action included in this complaint is readily apparent and leaves no doubt that pendant jurisdiction is appropriate.

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3. Ch. 38, § 60-3, Illinois Revised Statutes, 1967.

60-3 Violations—Enumeration § 3. Every person shall be deemed to have committed a violation of this Act who shall:

(1) Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:

a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto; * * *.

THE STATUTES OF LIMITATION.

Defendants assert, as part of their motions to dismiss, that statutes of limitation relevant to the various counts of the complaint bar relief with respect to many of the installment contracts presently included in this litigation under the Court's initial delineation of the plaintiff class. Plaintiffs' immediate response is to question the propriety of raising the issue of limitations by way of a motion to dismiss. Plaintiffs contend that the defense of limitations must instead be stated in defendants' answers to the complaint.

It is correct that some federal courts have found that the lack of detail in notice pleading renders improper the raising of limitations questions by motion to dismiss.[4] But the established rule in this Circuit is that where the complaint is definite enough to support consideration of a question of limitations, the question can be raised under Rule 9(f) of the Federal Rules of Civil Procedure by a motion to dismiss the complaint.[5] The instant complaint, it should be noted, does present sufficient background for immediate determination of the limitations question. Moreover, considering the scope of the present litigation and

4. *See* Annot., 61 A. L. R. 2d 300, 327 (1958).

5. Kincheloe v. Farmer, 214 F. 2d 604 (7th Cir. 1954), cert. denied 348 U. S. 920, 75 S. Ct. 306, 99 L. Ed. 721 (1955); Anderson v. Linton, 178 F. 2d 304 (7th Cir. 1949). In its later statement of the rule in Kincheloe the Seventh Circuit Court of Appeals said, "Rule 9(f) of such rules provides: 'For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.' It has frequently been held that the reason for 'averments of time and place' is to make ascertainable whether a cause of action is barred by the statute of limitations, and that where so shown a complaint is properly dismissed on motion. Gossard v. Gossard, 10 Cir., 149 F. 2d 111, 113; Anderson v. Linton, 7 Cir., 178 F. 2d 304, 309; Suckow Borax Mines Consolidated, Limited v. Borax Consol., 9 Cir., 185 F. 2d 196, 204, and cases therein cited." 214 F. 2d at 605.

the consequent magnitude of the discovery to be undertaken, it is particularly desirable that there be expeditious definition of the exact limits of the litigation in order to avoid unnecessary complexity and expense.

In posing the bar of statutes of limitation, defendants rely primarily on the opinion of the Seventh Circuit Court of Appeals in Baldwin v. Loew's Incorporated, 312 F. 2d 387 (7th Cir. 1963). Defendants draw the conclusion that *Baldwin* requires this Court to look to the dates of execution of the various contracts as the last point in time when the action with respect to any particular contract could have accrued. Defendants thereby insist that there can be no relief with respect to any contract that was executed earlier than the limitations period, even if payments were made at a later time still within the applicable period, are still being made, or are required under the contracts to be made for many years to come.

We of course agree that *Baldwin* states the rule in this Circuit in comparable cases. But defendants have seriously misunderstood how the facts in *Baldwin* relate to the principle stated and to the underlying rationale of statutory provisions for the limitation of actions.

Baldwin was a civil antitrust action brought by the owners of a movie theatre. The plaintiffs sought treble damages, charging a conspiracy of defendants, who included the major motion picture film distributors in the United States. It was alleged that "defendants were engaged in a continuing conspiracy in the licensing of film, in order to favor their own operated circuits of theatres and the circuits of theatres of others and to suppress the competition of independent theatre operators." 312 F. 2d at 389. It was alleged that because of the conspiracy, plaintiffs were forced to lease their theatre to one of these non-defendant "other" chain operators on terms far inferior to what plaintiffs would have obtained absent the unlawful conspiracy.

The lease in *Baldwin* was executed in 1945 for a five-year term, with successive options granted to the lessee to renew at five-year intervals until 1965. The lessee had exercised its option and renewed the lease in 1950 and 1955. The suit was filed in 1953, and the court was applying a two-year statute of limitations. In concluding that the action was barred by the two-year statute, the Court distilled its determination as follows:

> Where one has been injured by a civil conspiracy a statute of limitations begins to run at the time that injury is inflicted. In this case that date was when the lease was executed between plaintiffs and the lessee in 1945. *Id.* at 390.
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> * * * * * *
>
> The exercise in 1955 of an option to extend the lease of 1945, the year in which "the blow which caused the damage was struck", was relevant only as an element of damages. It was not an overt act from which the running of the statute of limitations may be computed. *Id.* at 391.

It is indisputable that on the facts alleged in *Baldwin* the defendants in *Baldwin* struck their blow and inflicted injury at the time of the execution of the lease. And on the facts alleged, this was the only time at which the conspiracy acted or could have acted to cause the injury and secure the unlawful benefit. The defendants in *Baldwin* were not parties to the lease. Conversely, the lessee was not a defendant. The defendants were not enforcing the lease and no payments were being made to them. The allegations in the instant complaint, by contrast, place defendants in a fundamentally different posture *vis a vis* the infliction of harm and exaction of unlawful benefit.[6] Defendants here

6. The importance of this difference was in fact fundamental in the argument of the *Baldwin* case on appeal. When defendants articulated their ultimately prevailing position that "ANY CLAIM FOR RELIEF ACCRUED WHEN THE THEATRE WAS LEASED AND NO OVERT ACTS OF DEFENDANTS

are alleged to have been reaping unlawful benefits through continuing enforcement of their unlawful scheme. Indeed, the best indication of what would be the continuing infliction of injury are the efforts to collect on the contracts which have brought plaintiffs repeatedly to this Court to seek relief from state actions instituted to evict them from the homes they contracted to purchase.

The Court said in *Baldwin*, "[t]he exercise in 1955 of an option * * * was relevant only as an element of damages," because the lessee exercised the option—not the defendants. The defendants had long before locked the plaintiff theatre into the unfavorable arrangement, and the defendants were not alleged to have done anything after the date of execution of the lease which could have constituted the infliction of harm that the Court rightly regarded as crucial.[7]

HAVE OCCURRED WITHIN THE PERIOD NOT BARRED BY THE STATUTE OF LIMITATIONS" they began by postulating the essential factual matter on which they clearly intended to base their position. They stated,

> The essence of the plaintiffs' alleged claim for relief is that they were forced by virtue of a conspiracy in restraint of trade, to lease their theatre to a company that operated a circuit of theatres. It is not alleged that the lessee was or is a co-conspirator with the defendants or was in any way affiliated with any of the defendants. In fact, it is alleged that the lessee is an "independent" operator of a circuit of theatres. Brief for the Appellee at 25, Baldwin v. Loew's Incorporated, 312 F. 2d 387 (7th Cir. 1963).

7. It is interesting in regard to *Baldwin's* validity to note the discussion in one of *Baldwin's* progeny, Century Hardware Corp. v. Powernail Company, 282 F. Supp. 223, (E. D. Wis. 1968). The Court in *Century Hardware* declared its "serious doubt about the soundness" of *Baldwin*, *Id.* at 227, and complained that *Baldwin* propounded "principles that, in practice, are extremely difficult to apply." *Id.* But it appears that a possible reason for the Court's complaint was a misreading of the facts of *Baldwin* similar to the misunderstanding displayed by defendants in this case. In stating the facts of *Baldwin*, the Court in *Century Hardware* wrote, "[h]owever, the plaintiffs had executed the lease of their theatre to a chain operator in 1945 and had exercised options to

Basic to defendants' misunderstanding of *Baldwin's* validity and relation to the instant case is the failure to keep in mind the purpose served by statutes of limitation. And defendants' error is common to some of the cases where analysis is similarly lost in the metaphysic of "essential" act or injury, the effort solely to determine when the "real" injury took place. Statutes of limitation do not properly depend on Platonic essences. The very practical and positive purpose served by these statutes is to ensure that stale claims will not be decided and the processes of justice thereby debilitated with attendant problems such as loss of evidence.[8] When this case is regarded in this light it is clear that the applicable statutes of limitation do not bar claims with respect to contracts not terminated before the running of the limitations periods. And regarded in this light, most of the very cases cited by defendants support this result.[9] In the critical

'renew the lease as late as December 31, 1955.'', *Id.* at 226. But in *Baldwin*, it was *not* the plaintiff lessors who held the option and exercised it. It was the lessee. And the lessee, as we have pointed out, was not a defendant, but so far as that lawsuit was concerned, was merely the beneficiary of the injury inflicted by defendants in 1945. The mistaken notion that plaintiffs in *Baldwin* held the option of course supports the impression that defendants were exerting pressure on plaintiffs subsequent to the execution of the lease in 1945; and therefore this misunderstanding of the facts might well cause a court to complain about *Baldwin*. But given an understanding of the facts, the *Baldwin* opinion is entirely consistent with the rationale of statutes of limitation, but is applicable only in the somewhat unique fact situation there presented. If it were to be given the interpretation defendants here urge, we too would have serious doubts as to its soundness.

8. Burnett v. New York Central R. R., 380 U. S. 424, 428, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965); Luckenbach S. S. Co. v. United States, 312 F. 2d 545 (2d Cir. 1963); D'Onofrio Const. Co. v. Recon Company, 255 F. 2d 904, 908 (1st Cir. 1958); United States v. Vibradamp Corp., 257 F. Supp. 931, 939-940 (S. D. Colo. 1966).

9. *See, e.g.*, Suckow Borax Mines Consol. v. Borax Consolidated, 185 F. 2d 196 (9th Cir. 1950); Fleischer v. A. A. P., Inc., 180 F. Supp. 717 (S. D. N. Y. 1959); Levy v. Paramount Pictures, Inc., 104 F. Supp. 787 (N. D. Cal. 1952).

sense intended under the statutes, the claims alleged in this case are obviously not stale. The circumstances of unlawfulness are alleged to be as present and vital today as at any time during the contract arrangements.

This immediacy of the alleged injury goes beyond the continuing collection of allegedly unlawful profit and enforcement of the contracts. It has been determined that the first count of this complaint states a claim for violation of the Civil Rights Act of 1866. Only the most parochial view of the Civil Rights Act would identify its ultimate intention to be simply the restoration of any monetary loss suffered on account of race. The abolition of slavery was to be a redemption of human dignity. The indignity alleged to have been suffered in this case cannot be confined to the dates of execution of the various contracts, but can be understood only in relation to the continuing activity whereby the alleged indignity continues to be inflicted and exploited. Thus, even if the rule in this Circuit were, contrary to *Baldwin*, that whatever the relation of the parties, continuing exactions under an allegedly unlawful contract could only constitute the accretion of "damage" and not "injury", this could not with reason be the rule in the special situation of a contract allegedly executed in violation of a person's civil rights.

It remains to determine which statutes of limitations are applicable in this case. The antitrust laws specifically include their own provisions for the limitation of actions. Consequently, there is no question as to which individual claims are barred with respect to Counts II and III of the complaint. The 1866 Civil Rights Act, however, which is the foundation for the cause of action stated in Count I of the complaint, does not contain any limitations provisions. Focusing this absence, plaintiffs argue that this court has great discretion to exercise its equitable powers to decide

which, if any, individual claims under the Civil Rights Act should be barred. Plaintiffs also argue alternatively that the limitations period of 10 years provided in Chapter 83, Section 17, Illinois Revised Statutes, 1967, or the 40 year statute of limitations provided in Chapter 83, Section 12.1, should be applied with respect to the cause of action stated in Count I of the complaint.

Where a federal statute does not stipulate a limitations period, the general practice in the federal courts is to apply the appropriate state statute. This is generally understood to be the statute that the forum state "would enforce had an action seeking similar relief been brought in a court of that state." Swan v. Board of Higher Education, 319 F. 2d 56, 59 (2 Cir. 1963). *See, also*, International Union, United Automobile, Aerospace and Agricultural Workers v. Hoosier Cardinal Corp., 383 U. S. 696, 703-705, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966); O'Sullivan v. Felix, 233 U. S. 318, 34 S. Ct. 596, 58 L. Ed. 980 (1914). Indeed, before a provision of limitations was added by Congress to the federal antitrust laws, the rule in this Circuit was that the Illinois statute for similar state actions should be applied. Schiffman Bros. v. Texas Co., 196 F. 2d 695 (7th Cir. 1952). And consistent with the general rule, the federal courts have uniformly applied state limitations provisions to claims stated under the Civil Rights Act, 42 U. S. C. §§ 1981-1985. *See, e. g.*, O'Sullivan v. Felix, *supra*; Hileman v. Knable, 391 F. 2d 596, 597 (3rd Cir. 1968); Beard v. Stephens, 372 F. 2d 685, 688 (5th Cir. 1967); Swan v. Board of Higher Education, 319 F. 2d 56, 59 (2 Cir. 1963); Smith v. Cremins, 308 F. 2d 187, 189, 98 A. L. R. 2d 1154 (9th Cir. 1962); Crawford v. Zeitler, 326 F. 2d 119, 121 (6th Cir. 1964); Wakat v. Harlib, 253 F. 2d 59 (7th Cir. 1958).

In Wakat v. Harlib the Seventh Circuit Court of Appeals effectively held the statute of limitations applicable to the claim stated in Count I of the instant complaint. In *Wakat* the plaintiffs alleged "violations of the federal civil rights act, 42 U. S. C. A. § 1981 et seq," particularly § 1983 and § 1985. The Court of Appeals held that the appropriate Illinois statute of limitations for the action under the Civil Rights Act was Chapter 83, Section 16, 1967 Illinois Revised Statutes (Section 15 of the Limitations Act) which provides a five-year period of limitations.[10] The Court understood the five-year provision to be expressly applicable to actions under the federal Civil Rights Act in that "a statutory right of action is a 'civil action not otherwise provided for' within the meaning of § 15 of the limitation act." 253 F. 2d at 63.

Contrary to what appears as the obvious meaning of *Wakat*, plaintiffs argue that the Court of Appeals did not regard the applicability of the five-year statute as a general rule in this Circuit, but rather, that the Court was simply exercising its discretion to allow the particular action asserted in that case. Plaintiffs urge this Court to apply the equitable doctrine of laches to determine the period during which plaintiffs in this case were required to pursue any relief under the Civil Rights Act.

The requested exercise of equitable discretion is precluded by the Court's judgment in *Wakat* that an express rule of law determines the limitations period for the 1866 Civil Rights Act. The Court declared with respect to Section 1985 of the Act,

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10. Section 15 of the Limitations Act provides that "* * * actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued."

> Count I relies expressly upon 42 U. S. C. A. § 1985 which creates a statutory right of action growing out of a conspiracy to impede, hinder, obstruct, or defeat the due course of justice in any state, with the intent therein set forth. This cause of action was created by statute. It is not one of the actions enumerated in § 14. However the Illinois limitations act, § 15, does cover all civil actions not otherwise provided for by that act and therefore the failure to include an action under § 1985 aforesaid within § 14 does not mean that Illinois has no limitation act to bar such an action. *Id.* at 63.

In view of this analysis, there is no reason to distinguish Section 1985 from the other sections of the Civil Rights Act of 1866, and the Court's discussion thus makes it clear that the relation of the five-year statute to relief under the Civil Rights Act was to be understood as a general rule. Moreover, while plaintiffs cite no cases which directly support their suggested theory of equitable discretion in this matter, their theory was specifically rejected by the Second Circuit Court of Appeals in Swan v. Board of Higher Education, 319 F. 2d 56 (2d Cir. 1963). There the Court reflected,

> Although plaintiff has not raised the point, we have considered whether, because his complaint seeks not damages but rather declaratory and injunctive relief, it should be considered solely "equitable" and hence as governed not by a statute of limitations but rather by the doctrine of laches. See, *e.g.*, Holmberg v. Armbrecht, 327 U. S. 392, 395-396, 66 S. Ct. 582, 90 L. Ed. 743 (1946). We have concluded, however, that since plaintiff could also have sought Civil Rights Act relief by way of damages, he is not here asserting "a federal right for which the sole remedy is in equity," Holmberg v. Armbrecht, 327 U. S. at 395, 66 S. Ct. at 584, and hence the situation is one of "concurrent" legal and equitable jurisdiction, in which case the statute of limitations does apply. Compare Holmberg v. Arm-

brecht, *supra,* and Russell v. Todd, 309 U. S. 280, 60 S. Ct. 527, 84 L. Ed. 754 (1940), with Cope v. Anderson, 331 U. S. 461, 67 S. Ct. 1340, 91 L. Ed. 1602 (1947). *Id.* at 59-60, n. 5.

Plaintiffs' contention that either a 40 year or a 10 year statute of limitations is applicable to Count I involves the same disregard of the specific instruction in *Wakat* as plaintiffs' urging of the exercise of equitable discretion. Plaintiffs apparently proceed on the theory that where an action under the Civil Rights Act involves contracts, a federal court must apply the forum state's period of limitations applicable to contract actions, which in this case is asserted to be the Illinois ten-year provision, Ch. 83, § 17, Illinois Revised Statutes; or that where the civil rights action involves real estate, state limitations specifically relating to real estate are applicable, which in this case is asserted to be the 40 year period provided in Ch. 83, § 12.1, Illinois Revised Statutes, 1967. But this position is essentially no different from the contention advanced in *Wakat* that because the alleged violations of the Civil Rights Act were in the nature of false imprisonment, the statute of limitations applicable to the civil rights action was the two-year statutory period for the tort of false imprisonment, Section 14 of the Limitations Act, Ch. 83 § 15, Illinois Revised Statutes, 1967. As is clear from the holding in the *Wakat* opinion quoted above,[11] the Court rejected the notion that Section 14 of the Limitations Act was in any sense related to an action under the Civil Rights Act. The Court stated that to the contrary it found the civil rights action to be "an action not otherwise provided for" and thereby covered by the five-year provision that is Section 15 of the Limitations Act. Thus the Court in *Wakat* understood an action under the Civil Rights Act to be independent of the limitations provided for specific

11. See text *supra* at p. 222.

causes of action which might be suggested by the allegations that constitute a claim under the Civil Rights Act. It is clear, therefore, that neither the 10 year period relating to contracts, nor the 40 year period relating to transactions in real estate, is applicable to Count I of this complaint. The rather obvious instruction of the Seventh Circuit Court of Appeals in Wakat v. Harlib is that the five-year period provided in Chapter 83, Section 16, Illinois Revised Statutes, must be applied to bar contracts terminated more than five years before the filing of this lawsuit.

It follows from the foregoing that the plaintiff class as previously defined must be redefined so as to eliminate therefrom all negro purchasers of residential real estate under land contracts from the named sellers whose contracts terminated prior to January 6, 1964.

Count IV—The Federal Securities Laws.

Seeking to establish a cause of action under Section 27 of the Securities and Exchange Act of 1934, plaintiffs reassert the allegations included in the other counts but attempt to describe the alleged activity as the selling of securities by false and misleading solicitation through interstate commerce. That is, plaintiffs maintain that the installment contracts are "securities" as that term is properly understood under the federal securities laws.

But however imaginatively the allegations in this count have been phrased with respect to the federal securities laws, the installment contracts are not securities under the decided cases. And this is clear even under the most general statements of the criteria for determining when a transaction involves a "security". For one key example, the Supreme Court stated in S. E. C. v. W. J. Howey Co., 328 U. S. 293, 301, 66 S. Ct. 1100, 90 L. Ed. 1244 and re-

cently repeated in Tcherepnin v. Knight, 389 U. S. 332, 338, 88 S. Ct. 548, 554, 19 L. Ed. 2d 564 (1967), that "[t]he test (for an investment contract) is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." Similarly instructive is the comment by Professor Loss, widely recognized in the cases, that

> The line is drawn, however, where neither the element of a common enterprise nor the element of reliance on the efforts of another is present. For example, no "investment contract" is involved when a person invests in real estate, with the hope perhaps of earning a profit as the result of a general increase in values concurrent with the development of the neighborhood, as long as he does not do so as part of an enterprise whereby it is expressly or impliedly understood that the property will be developed or operated by others. 1 Loss, Securities Regulation, 491-2 (2d ed., 1961).

Plaintiffs point to the executory nature of these contracts, to the facts that both plaintiffs and defendants had interests they could sell to third persons, and to the fact that plaintiffs were entitled on full compliance with their contracts to receive property of appreciated value. They also insist that both plaintiffs and defendants could have expected to profit from efforts to maintain the properties.

But still, incontrovertibly, the allegations in the complaint establish that plaintiffs, at the time of purchase, intended to acquire personal residences. To conclude that the natural desire of any purchaser that his purchase should appreciate in value makes a "security" of what has been purchased, is obviously to so muddle the term as to make it meaningless. The properties purchased were subject to plaintiffs' control. And even if defendants are considered to have been engaged in a "common enter-

prise", an essential allegation of the complaint is that it was defendants alone who sought to profit from any scheme, while plaintiffs, who only intended to purchase personal residences, were their innocent victims. In other words, the transactions cannot be likened to an investment in securities without complete confusion of the alleged relation of the parties to this litigation.

That a cause of action is not stated under the federal securities laws is also shown by the insufficiency of the complaint in its allegations of false representation or concealment of a material fact or device, scheme or artifice to defraud under Section 17(a) of the Securities and Exchange Act of 1934. For instance, plaintiffs allege that defendants concealed appraisals obtained from their mortgage lenders as well as the prices paid to former white owners of the properties. But the usual practice in real estate dealings is not to volunteer this information. Or again, plaintiffs allege that defendants were guilty of misrepresentation of the values of the properties they sold to plaintiffs. But as to this alleged misrepresentation of value, plaintiffs specify nothing beyond what is considered in the law to be mere "puffing" by a seller, and in no degree fraudulent conduct. Thus, conduct here asserted to be in violation of the federal antitrust laws is recognized in other areas of the law as the usual and legitimate practice in the buying and selling of real estate. And what is true of the particular allegations just mentioned illustrates in general the misplacement of the securities concept in this case.

Finally, it would be a gross and unsupported enlargement of the presently exercised jurisdiction and responsibility of the Securities and Exchange Commission to hold that the common sale of residential real estate by installment contract is subject to the federal securities laws. Indeed,

plaintiffs indicate their recognition of this by stating in their brief that " the federal law should be interpreted to protect purchasers such as plaintiffs in the case at bar because "the type of interests reposed in plaintiffs and defendants as a result of the sale of installment contracts are not sufficiently regulated under Illinois law * * *." In asking the Court to be so creative, plaintiffs acknowledge that the federal and state securities and fraud laws as presently stated and understood do not provide the requested protection. Accordingly, the motions to dismiss Count IV of the complaint must be granted.

Count V—Unconscionability, Fraud, Usury and Breach of Implied Warranties.

In support of the claim of fraud asserted in Count V of the complaint, plaintiffs allege that defendants concealed the prices paid to the former white owners of the real estate, concealed appraisals of the properties, and concealed the existence of violations of the municipal building code. These allegations are supposed to constitute the material misrepresentation of fact essential to a cause of action for fraud. *See, e. g.*, Bennett v. Hodge, 374 Ill. 326, 332, 29 N. E. 2d 524, 527 (1940); Zanbetiz v. Trans World Airlines, Inc., 72 Ill. App. 2d 192, 219 N. E. 2d 98 (1966).

However, the alleged deception as to value is in no manner distinguishable under Illinois law from the range of matter covered by the general rule that statements as to value in such transactions are to be considered merely "opinion" rather than statements of material fact.[12] In Coleman v.

12. *See, e. g.*, Pustelniak v. Vilimas, 352 Ill. 270, 275, 185 N. E. 611, 613-614 (1933); Bouxsein v. First Nat'l Bank, 292 Ill. 500, 504, 127 N. E. 433, 134 (1920); Scott v. Wilson, 15 Ill. App. 2d 456, 146 N. E. 2d 397 (1st Dist. 1957).

Goran, No. 47992 (1st Dist. June 14, 1960),[13] the Illinois Appellate Court for the First District repeated the general rule and stated its primary exception as follows:

> Statements as to value of property are ordinarily considered mere expressions of opinion, and, for that reason, are not sufficient to warrant a recision of the contract, even though they are false and relied upon by the other party. The rule is otherwise where the misrepresentation relates a specific, extrinsic fact, peculiarly within the knowledge of the party making the statement, which materially affects the value. *Id.* at 4.

Count V of this complaint does not include any allegation which would bring it within the purview of the exception. In particular, the allegation that defendants did not reveal violations of the municipal building code and thereby "concealed the violations, does not amount to the sort of reliance which can substantiate a cause of action under the exception to the general Illinois rule. *Coleman* involved a very similar allegation which the Court specifically held to be insufficient, stating in summation of the Illinois law,

> If the purchaser has an opportunity to view the property, it is his duty to make use of that opportunity. Unless the representations concern matters which the prospective purchaser cannot readily determine upon examination, he will be held to have exercised his own judgment rather than to have relied on the statements of the seller. [Citing Malnick v. Rosenthal, 313 Ill. App. 249, 255 [39 N. E. 2d 767] (1942) and Bundesen v. Lewis, 368 Ill. 623 [15 N. E. 2d 520] (1938).] *Id.* at 6.

Furthermore, while we cannot accept the proposition that concealment of appraisal is never relevant to a claim of fraud, a general allegation of such concealment in the absence of other specific pleading of fraud obviously can-

13. An abstract of this opinion is published in 26 Ill. App. 2d 288, 168 N. E. 2d 56 (1st Dist. 1960).

not suffice for a statement of a cause of action for fraud. It obviously cannot simply because while sellers will often obtain such appraisals, the revelation of the appraisals to their buyers is not even the custom nor usual expectation in real estate transactions. The same is true of the allegation that defendants concealed the prices at which they purchased the real estate in question from the former white owners.

This failure to state specific elements making up a cause of action for fraud indicates a more general, yet independent, failing of the claim. There is absent the definiteness that is required by Rule 9(b) of the Federal Rules of Civil Procedure as a condition of pleading fraud in the federal courts.[14] This, however, does not mean that a complaint properly alleging fraud in a class action must specify the particular details of every transaction and occurrence that comprises the allegedly unlawful activity. Such a requirement would undermine the utility of the class action device, particularly in a case of this magnitude, involving a multitude of similar individual relationships. The burden of pleading would eliminate the device in the very cases where it might be most appropriate and most useful. But even considering the special problem of pleading fraud in a class action, it is still reasonable and necessary that the class action complaint state generally facts establishing each and every element essential to a cause of action for fraud.

As clearly defined in Illinois law, the elements are: (1)

14. Federal Rule 9(b) provides an exceptional requirement for federal notice pleading, stating that "'[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.'" *See*, Krulikowsky v. Metro Dist. Council, 30 F. R. D. 24, 26 (E. D. Pa. 1962); Dixie Mercerizing Company v. Triangle Thread Mills, 17 F. R. D. 8, 9 (S. D. N. Y. 1955); 2A Moore, Federal Practice, ¶ 9.03 at 1923-37 (2d Ed. 1968).

The misrepresentation must be of a statement of fact; (2) is must be made for the purpose of influencing the other party to act; (3) it must be untrue; (4) the party making the statement must know or believe it to be untrue; (5) the person to whom it is made must believe and rely on the statement; and (6) the statement must be material. Bennett v. Hodge, 374 Ill. 326, 332, 29 N. E. 524, 527 (1940). *Accord*, Zanbetiz v. Trans World Airlines, Inc., 72 Ill. App. 2d 192, 219 N. E. 2d 98, 102 (1st Dist. 1966). Besides the failure to specify anything that could be considered a material misstatement under Illinois law, the complaint in this case fails to articulate the other elements required. The instruction of Rule 9(b) is certainly at least that the basic elements of a cause of action for fraud cannot be left to implication.

Moreover, plaintiffs' claim of breach of implied warranties is similarly defective. Nothing but the bare conclusion that breach of warranties have occurred is stated. Though the claimed breach of warranties may be impliedly related to the general background of activity and circumstance pleaded in Count V and previously in Count I, there is no delineation of the substance of the alleged cause of action, nothing which would satisfy even the liberal federal notice pleading requirements.[15]

As an aspect of the cause of action plaintiffs seek to establish under Count V of the complaint, plaintiffs urge the equitable concept of unconscionability. They allege that the strategy of exploitation engaged in by defendants, including the exploitation of plaintiffs' lack of education

15. As this Court stated in Huey v. Barloga, 277 F. Supp. 864, 871 (1967).

> Although pleadings are given a liberal construction in the federal courts, the Rules contemplate some factual statement in support of the claim. General allegations of this kind unsupported by any factual statements have usually been rejected as insufficient.

and lack of experience in real estate matters relative to defendants, resulted in the "unconscionable provisions" and "unconscionable prices" allegedly characteristic of these contracts. Plaintiffs thus claim not that the device of the installment contract or the provisions relating to evictions, confessions, forfeitures and defaults are unconscionable *per se*, but that they represent unconscionability as they resulted in this case.

The equitable concept of "unconscionability" becomes meaningful always in the context of otherwise defined factors of inequality, deception and oppression. A standard statement of the concept reads,

> When the accompanying incidents are inequitable and show bad faith, such as concealments, misrepresentations, undue influence, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative. 3 Pomeroy, Equity Jurisprudence, § 928, pp. 640-641 (1941).

The Illinois cases present a great variety of situations where a concurrence of any of the above elements will be sufficient for invocation of the principle of unconscionability. But one point at least is clear upon review of the cases. Application of the doctrine requires extreme circumstances beyond what can be understood or implied from any of the allegations in this complaint. As already discussed, the complaint does not state the bare substance of a claim of fraud. Furthermore, plaintiffs' lack of education and lack of experience relative to defendants can obviously not in itself independently constitute a significant factor of unconscionability in a free market system where such relationships are the inevitable day-to-day matter of the

functioning economy. Moreover, the general rule is that mere excessive price is not a sufficient circumstance to independently support a claim of unconscionability. *See,* Chicago Title & Trust Co. v. Illinois Merchants' Trust Co., 329 Ill. 334, 346, 160 N. E. 597, 603 (1928); Scott v. Wilson, 15 Ill. App. 2d 456, 146 N. E. 2d 397 (1st Dist 1957). Even the rare Illinois cases that consider a disparity in values exchanged as a sufficient independent circumstance involve egregious disparity well beyond what is alleged in this case.[16] Also, these rare cases are significantly distinct from the instant case in that the court is typically being asked to enforce the unconscionable contract; and when the court refuses, it states as its reason the classic proposition that "[c]ourts of equity will not lend their aid to assist one in realizing upon an unconscionable bargain." Koch v. Streuter, 232 Ill. 594, 604, 83 N. E. 1072, 1077 (1908). *See, also,* In re Chicago Reed & Furniture Co., 7 F. 2d 885, 886 (7th Cir. 1925).

Finally, plaintiffs have also alleged that due to the shortage of housing for negroes, plaintiffs were placed in a position of unequal bargaining power severe enough to render the contracts that resulted from defendants exploitation of this situation unconscionable. But while the discriminatory exploitation of a system of *de facto* segregation is unlawful under the Civil Rights Act, the artificial shortage of housing for negroes does not constitute an appropriate foundation for application of the principle of unconscionability. As the principle is generally understood in the law of the State of Illinois, it does not normally extend to situations resulting from artificially contrived market conditions. By contrast, the economic substance of the injustice described in this complaint relates naturally

16. For instance, Koch v. Streuter, 232 Ill. 594, 604, 83 N. E. 1072 (1908), was a case where an exchange of a $25,000 value for little more than zero was declared by the court to be a sufficient independent circumstance.

to the concerns of the antitrust laws and the Civil Rights Act. While on the basis of some extreme situation of unequal bargaining power due to the conjunction of absolute need and dire shortage, a court might conceivably apply the doctrine of unconscionability, such circumstances are not described in the instant complaint and the necessarily awkward extension of the principle to support Count V of this cause would necessarily create a misfit in the law.

In Count V of the complaint plaintiffs also assert that defendants are guilty of violation of the usury law of the State of Illinois, Illinois Revised Statutes ch. 74, § 5 (1967). Plaintiffs offer the following statement on the basis for their claim:

> (j) Defendant-sellers extracted from plaintiffs unlawful and usurious rates of interest through the devices and subterfuges of (i) charging plaintiffs excessive amounts for insurance, (ii) charging plaintiffs for commissions for obtaining insurance, (iii) collection of deposits for real estate taxes many months prior to the time the taxes were due or paid; (iv) charging excessive amounts for so-called closing costs, and (v) increasing the purchase prices to amounts far in excess of the fair value of the properties. The real purpose and effect of the transaction was to provide for excessive and usurious rates of interest to be taxed against and paid by plaintiffs.

It has always been the understanding of the courts that the Illinois usury statute relates to loans as distinct from purchase and sale. *See, e. g.*, In Re Oakes, 267 F. 2d 516, 518 (7th Cir. 1959); Manufacturers Finance Trust v. Stone, 251 Ill. App. 414, 420 (4th Dist. 1929); Primley v. Shirk, 60 Ill. App. 312, 314 (1st Dist. 1895); aff'd, 163 Ill. 389, 45 N. E. 247 (1896). Plaintiffs, however, contend that to conclude that the contracts in this case are not usurious under the law would be to allow a triumph of terminology over reality. They insist that though the transactions in

this case are commonly described as purchase and sale, the various devices described by the above allegations were all means by which defendants secured usurious rates of interest for what were essentially loans.

We reiterate that it is obvious from the substance of this complaint that the intention of each of the plaintiffs, at the time of execution of the contracts, was the purchase of a personal residence. The rule in Illinois has long been that "on a sale of property * * * there can be no usury charged simply because the price is fixed at one sum if paid at one time, and at another sum if paid at another." Primley v. Shirk, 60 Ill. App. 312, 314 (1st Dist. 1895), aff'd 163 Ill. 389, 45 N. E. 247 (1896). Plaintiffs submit no support for the proposition that price in excess of fair market value can make a loan of what is commonly understood to be a purchase and sale. And even if this were a case where the underlying reality is a loan, the excess in price could not be considered interest under the Illinois law as presently interpreted. A similar conclusion was stated by Judge Duffy in his concurring opinion In Re Oakes, where he said,

> As an original proposition, I would say the transaction in question was a loan. When a seller receives consideration from a buyer solely because of delayed payment, this consideration is, in fact, interest whether it is called "service charges," "finance charges," "risk fees," or some other name. Nevertheless, in this case we must follow Illinois law and decisions by Illinois Courts. Decisions such as Manufacturers Finance Trust v. Stone, 251 Ill. App. 414 compel a holding by us that the transaction in question is a sale and not a loan. 267 F. 2d 516, 519-520 (7th Cir. 1959).

Judge Duffy's conclusion as to the incidental charges is equally applicable to the charges alleged in this case. In particular, the advance collection of deposits for real

estate taxes is a common practice to assure the avoidance of tax liens. Plaintiffs submit no case which suggests that such practice has ever been held to bring a sale of real estate within the usury prohibition. It has indeed expressly been held in Illinois that payment of real estate taxes by a borrower did not render a transaction usurious though the stated interest rate was the highest legal rate. Kidder v. Vandersloot, 114 Ill. 133, 28 N. E. 460 (1885). Also, it has been recently held that a mortgagor's payment of insurance premiums in addition to interest on a loan did not render the loan usurious notwithstanding that the insurance was issued by and assigned to the mortgagor itself, so long as the insurance was normal in respect to premiums and costs. Equitable Life Assurance Society of United States v. Scali, 38 Ill. 2d 544, 232 N. E. 2d 712 (1967). In sum, whatever the "reality" of the transactions in this case, so far as the claim of usury is concerned, our obligation to follow the Illinois law requires that the motions to dismiss be granted.

Motions of Various Banks to Dismiss and for Summary Judgment.

Certain of the banks named as defendants in their capacity as trustees under land trust agreements have moved to dismiss or for summary judgment on the ground that they hold only legal title to the properties in question and have no authority to deal with the properties beyond their limited responsibilities as trustees. They describe their responsibilities under the agreements and the law of Illinois as comprehended by the duty to follow directions of beneficiaries and to perform certain ministerial responsibilities. They insist that they lack any power of management or control which could be the basis for participation in the alleged conspiracy and pattern of discriminatory

conduct. The complaint, however, alleges that these defendants actively participated together with the other defendants in the unlawful activity. At this early stage of the litigation, on the basis of the complaint, motions and affidavits before the Court, the allegation that the banks have participated is not so frivolous nor unlikely as to render it appropriate to grant the banks' motions. On the basis of the allegations, it is certain that in some circumstances at least, the banks would have had notice of the disparities in price, the appraisals and the "turn-around" nature of some purchases and sales. In other words, the allegations as directed against the movant banks have stated causes of action and raised material issues of fact which under Rules 12(b) (2), 12(b) (6) and Rule 56 of the Federal Rules require denial of the banks' motions.

Moreover, although the banks claim that they are not the real parties in interest and could not, therefore, participate in the unlawful activity alleged, the banks in many instances are the only identified sellers since they executed the contracts as sellers, and the buyers have no way to identify the real parties whom the banks assert have complete management and control over the trust properties. Until such disclosure is made, plaintiffs are relegated to the public record as it now stands in seeking vindication of any right or recovery of any loss. For the present, therefore, plaintiffs properly assert their claims against the banks even though the banks may subsequently demonstrate that they are only nominal parties in interest.

Finally, it is also right that the banks should remain parties at this stage of the litigation because their presence may well be required for the successful implementation of any relief granted. While a trustee bank could generally be expected to cooperate in the implementation of any decree directed to the beneficiaries under a trust, the lack

of identification of the real parties in interest creates possible complications which make it desirable to retain the banks at this time as named defendants. In any case, the presence of the trustee will indubitably facilitate the implementation of any decree because the trustee may be required to act as a prime mover in the resolution of the litigation with respect to a particular contract.

Motions to Dismiss "Contract Buyers League".

Defendants have moved to dismiss "Contract Buyers League" as a party plaintiff. The position they take is that the Contract Buyers League is not a proper party to this case because Rule 17 of the Federal Rules of Civil Procedure requires that "[e]very action shall be prosecuted in the name of the real party in interest", and because the Contract Buyers League does not survive Rule 17(b), which in determining capacity to sue or be sued provides,

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States * * *.

In response to the motions to dismiss, plaintiffs analogize the situation of the Contract Buyers League to various organizations which in promoting the interests of their members have been found to have standing in the federal courts. But the cases cited by plaintiffs are inapposite.

The analogies all ultimately fail because they disregard the fundamental premises of Rule 17.

Rule 17 is intended to ensure that the contours of a given litigation extend no further than the interests apparently necessary for the resolution of the controversy stated. This is the import of both the requirement that "[e]very action shall be prosecuted in the name of the real party in interest," and of the requirement that the participation of an unincorporated association be justified by the showing that the case involves the "enforce[ement] for or against it [of] a substantive right existing under the Constitution or laws of the United States."

Plaintiffs rely in large measure on the similarity of the role in litigation of the Contract Buyers League and the NAACP. Specifically, plaintiffs cite NAACP v. Alabama, 357 U. S. 449; 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958), even though that case is obviously distinguishable, like other cases involving the NAACP on the ground that the NAACP is a corporation while the Contract Buyers League is an unincorporated association, a distinction specifically recognized in Rule 17. And in the Alabama case, the NAACP itself was being sued by the State of Alabama which was seeking to enjoin it from engaging in activity within the State. The case was thus brought to enforce an alleged substantive right against the association, a situation which is not present in this case, but which is the condition for a finding that a grouping of individuals that is merely an unincorporated association has standing. One example of this situation where an unincorporated association is properly a party is another case cited by plaintiffs, Todd v. Joint Apprenticeship Committee of Steel Workers of Chicago, 223 F. Supp. 12 (N. D. Ill. 1963). The court in *Todd* pointed out that Rule 17(b)(1) authorized the suit against the unincorporated associa-

tion because the suit was brought to enforce a substantive right against the association as the rule explicitly requires. *Id.* at 17:

> What the cases point to and what the rule generally stated means is that the test for whether an unincorporated association is a proper party is whether relief that may be granted will either redound to the benefit of the party alleged to have standing, or will cause the alleged party to suffer damage. Stated simply, the crux of the matter in the instant case is that, except as it is named in certain defendants' counterclaims,[17] there is no relief which this Court is being asked to grant for or against the Contract Buyers League. The Court has asked plaintiffs for information descriptive of the organization called "Contract Buyers League," particularly as to its activities and purposes. In their argument to the Court, plaintiffs have subsequently described the Contract Buyers League so as to restrict the life and purpose of the organization solely to this lawsuit. It appears to be an organization created exclusively to concern itself with the particular matters presented for resolution in this action. But the members of the Contract Buyers League who hold the contracts that are the substance of this litigation are fully in this case as members of the defined class of plaintiffs. Any relief secured will be secured by them directly as members of the class, and as the case is presently stated,

17. The provision of Rule 17 that an unincorporated association "* * * may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States" clearly does not refer to a defendant's counterclaim or apply to a situation in which a counterplaintiff is seeking to have a counterdefendant dismissed as a plaintiff. The counterclaim is obviously dependent on the validity of the counterdefendant's status as a plaintiff and the granting of defendants' motion to dismiss Contract Buyers League as a plaintiff will necessarily require defendants' dismissal of the counterclaim they have filed against the Contract Buyers League.

the Contract Buyers League consequently cannot be the object of any relief. Moreover, the cases cited by plaintiffs, except for what appears to be a single possible aberration,[18] do not indicate a determination by any court that both a class of persons and the association that represents the class can be proper parties. In the cases cited by plaintiffs, contrary to the instant case, the court was being asked by the organization alone for relief. One of these cases, for instance, is Citizens Association of Georgetown v. Simonson, D. C. Cir., 403 F. 2d 175, where the suit was brought by the organization for its members, who were not present in the case in their own right.

Finally, there is no logic to the argument that the pres-

18. The only case which appears to stand for this conclusion is Alston v. School Board, 112 F. 2d 992, 130 A. L. R. 1506 (4th Cir. 1940). But the structure of the opinion makes it clear that the court's statement on this matter was in the nature of dicta. In a rather offhanded manner, after the questions presented in the case had been decided, the Court remarked, "[w]e should say, too, that we have no doubt as to the Norfolk Teachers Association's being a proper party to the suit. According to the complaint, it is a voluntary unincorporated association and 'is composed of Negro teachers and principals in the public colored schools of Norfolk'; and the right of such an association to sue in its common name for the purpose of enforcing substantive rights under the Constitution of the United States is provided for under Rules of Civil Procedure. Rule 17(b), 28 U. S. C. A. following section 723c. The point is not important, however, as the suit is brought as a class suit and the members of the association belong to the same class as the plaintiff Alston." *Id.* at 997.

The court didn't consider the problem serious enough in *Alston* to see the illogic of the position stated. For under the terms of Rule 17, how could the teachers' association be included if the substantive right was being enforced for the class that included the members of the Association? Either the class or the Association was the proper party, but not both. Moreover, the Court was also incorrect to conclude that the point makes no difference. The possibility of a counterclaim against the unincorporated association, in this case the Contract Buyers League, demonstrates that the admission of an unincorporated association superfluous to any remedy to be granted, may well distort or extend the case stated in the complaint so as to destroy the limits which Rule 17 is intended to ensure.

ence of the Contract Buyers League in this suit is somehow required as a condition for plaintiffs to organize for the vindication of their rights. Any organizational efforts outside the courtroom do not in any necessary manner depend on the presence of the Contract Buyers League as a party to this suit. Thus neither under Rule 17 nor for any other reason is the presence of the Contract Buyers League as a party to this suit justified. The motions to dismiss the Contract Buyers League must therefore be granted.

Appropriate orders consistent with all the foregoing will be entered.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1969 — September Session, 1969

Nos. 17815, 17816
CHARLES BAKER, et al.,
Plaintiffs-Appellees,
v.
F & F INVESTMENT, et al.,
Defendants-Appellants.

Nos. 17750, 17751
SIDNEY CLARK, et al.,
Plaintiffs-Appellees,
v.
UNIVERSAL BUILDERS, INC., et al.,
Defendants-Appellants.

Interlocutory appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

January 6, 1970.

Before DUFFY, Senior Circuit Judge, KILEY and CUMMINGS, Circuit Judges.

CUMMINGS, *Circuit Judge.* These consolidated appeals concern statute of limitations rulings of the district court with respect to two related class actions brought by Negro purchasers of new and used residential real estate in Chicago. The purchases were on installment contracts allegedly

containing terms less favorable to Negroes than would have been available to whites. Count I of each complaint was based principally on Section 1982 of the Civil Rights Act of 1866 (42 U. S. C. § 1982), as construed in *Jones* v. *Mayer*, 392 U. S. 409. Count II of the *Baker* complaint alleged violations of the federal antitrust laws, and Count III of the *Baker* complaint alleged violations of the Illinois antitrust laws.[1]

The district court held that the Illinois 5-year statute of limitations governing civil actions not otherwise provided for (Ill. Rev. Stat. (1967) ch. 83, § 16) is applicable to Count I of both complaints and that the 4-year statutes of limitations contained in the federal and Illinois antitrust laws (15 U. S. C. § 15b and Ill. Rev. Stat. (1967) ch. 38, § 60-7) are respectively applicable to *Baker* Counts II and III. However, the court held that the statutes of limitations run from the date the real estate installment contracts terminate rather than from the date they were executed, as defendants had contended. Accordingly, the court concluded that the plaintiff classes must be redefined to eliminate the purchasers whose contracts terminated prior to the periods of limitations.[2] Defendants have brought interlocutory appeals from the district court's decision and plaintiffs were given leave to cross appeal. These interlocutory and cross appeals require us to decide whether the doctrine of laches is applicable. If not, we must determine what statutes of limitations, if any, are

1. Since the court below held that plaintiff stated a claim for relief under Section 1982, it did not pass upon the motions to dismiss as to violations of Section 1981, 1983 and 1985(3) of the Civil Rights Act and of the Thirteenth and Fourteenth Amendments to the Constitution of the United States, nor do we. Motions to dismiss were sustained as to other Counts of both complaints. Those Counts are not involved in this appeal.

2. The opinion of the district court is reported at 300 F. Supp. 210.

applicable to Counts I of each complaint and to *Baker* Counts II and III, and when they began to run.

The Doctrine of Laches Is Inapplicable.

As to Count I based on the Civil Rights Act, plaintiffs and the United States as *amicus curiae* urge that the claims are governed by laches rather than by the statutes of limitations. They would be correct if the claims were solely equitable. *Russell* v. *Todd*, 309 U. S. 280; *Holmberg* v. *Armbrecht*, 327 U. S. 392. However, the complaints seek money damages, both actual and punitive, and cannot be deemed exclusively equitable. Therefore, as we recently held in *Morgan* v. *Koch*, ... F. 2d ..... (7th Cir., 1969), the doctrine of laches does not apply to the Count I claims.[3]

State Statutes of Limitation Apply to Federal Civil Rights Actions.

Despite long settled rulings to the contrary, plaintiffs assert that no state statute of limitations bars federal civil rights actions. Ever since the 1915 decision of the Supreme Court in *O'Sullivan* v. *Felix*, 233 U. S. 318, the courts have uniformly held that state limitations statutes are to be applied to federal civil rights actions other than those based upon Section 1986 of the 1871 Act (42 U. S. C. § 1986). See, *e.g.*, *Francis* v. *Lyman*, 203 F. 2d 809 (1st Cir. 1953), certiorari denied, 346 U. S. 835; *Swan* v. *Board of Higher Education of City of New York*, 319 F. 2d 56, 59 (2d Cir. 1963); *Hileman* v. *Knable*, 391 F. 2d 596, 597 (3d Cir. 1968); *Beard* v. *Stephens*, 372 F. 2d 685, 688 (5th Cir.

3. It is unnecessary to consider the Illinois laches cases cited by plaintiffs. The applicability of the doctrine of laches to actions in federal courts based on federally created causes of action is a matter of federal and not state law. We need not decide the extent to which federal courts should follow state decisions where the doctrine is applicable.

1967); *Crawford* v. *Zeitler*, 326 F. 2d 119, 121 (6th Cir. 1964); *Smith* v. *Cremins*, 308 F. 2d 187, 189 (9th Cir. 1962). Our decision in *Wakat* v. *Harlib*, 253 F. 2d 59 (7th Cir. 1958); is to the same effect and requires our rejection of plaintiffs' argument that no statute of limitations bars Count I of these complaints.

Plaintiffs, however, argue that these decisions rest upon a faulty application of the Rules of Decision Act (28 U. S. C. § 1652).[4] They contend that the original purpose of that statute was to reassure opponents of diversity jurisdiction that state law would be applied by federal courts in diversity cases. They argue that any limitation on federally based actions is properly a matter of federal law and that the exception in the Rules of Decision Act covers this case. They urge that civil rights actions demand uniform federal rules in all particulars and that the failure of Congress to enact a statute of limitations applicable to Section 1982 of the Civil Rights Act evidences an intent that no statutory limitation should bar relief. We are unable to accept this position.

Regardless of the intended effect which the Rules of Decision Act was to have upon diversity jurisdiction, it was soon firmly applied to those gaps in federal law for which no uniform, common law was felt by the courts to be necessary. More than 30 years before the enactment of the Civil Rights Act, the Supreme Court held in *McClung* v. *Silliman*, 28 U. S. (3 Pet.) 270, that under the Rules of Decision Act the federal courts must apply state statutes of limitations to federal causes of action in the absence of a special provision by Congress:

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4. The statute provides:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in courts of the United States, in cases where they apply."

> "Under this statute [the Rules of Decision Act] the acts of limitations of the several states, where no special provision has been made by Congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts." 28 U. S. (3 Pet.) at p. 277.[5]

This rule has never been seriously challenged. Moreover, since *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, overruled the doctrine of *Swift* v. *Tyson*, 41 U. S. (16 Pet.) 1, adoption of state statutes to fill gaps in federal law has continued as a prime function of the Rules of Decision Act.

Nor does that Act's exception to state rules which conflict with federal law apply to statutes of limitations. Limitations on the period within which a right may be redressed do not conflict with the existence of that right. Cf. the *Virginia Coupon Cases*, 114 U. S. 269, 303. Rather, absent a direct expression by Congress to the contrary, limitations on actions are deemed so universal that the courts must supply an appropriate period by absorbing an applicable state statute into the interstices of federal law. As the Court stated in *Campbell* v. *Haverhill*, 155 U. S. 610, 616-617:

> "Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions. The result is that users of patented articles, perhaps innocent of any wrong intention, may be fretted by actions brought against them after all their witnesses are dead, and perhaps after all memory of

5. Despite plaintiffs' characterization, *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1, 13, does not suggest that *McCluny* involved no federal question at all but was only an action under an implied contract. McCluny had asserted that his "rights accrued to him under a law of congress." 28 U. S. (3 Pet.) at p. 276. This is also reaffirmed in the discussion of the *McCluny* case in *Campbell* v. *Haverhill*, 155 U. S. 610, 619-620.

> the transaction is lost to them. This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in *Adams* v. *Woods*, 2 Cranch, 336, 342, of a similar statute: 'This would be utterly repugnant to the genius of our laws.' "

In addition to the application of a state statute of limitations to the Civil Rights Act of 1870 in *O'Sullivan* v. *Felix*, 233 U. S. 318, state statutes of limitations have been held to prescribe limitations standards for such diverse and important federal Acts as the Sherman Antitrust Act (*Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390), and the Labor Management Relations Act of 1947 (*United Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696). Plaintiffs have furnished no convincing distinction between the use of state limitations statutes for those statutes and their application to actions under the various Civil Rights Acts. No evidence from the legislative history or the nature of the Civil Rights Acts points to such a distinction. Federal legislation is often directed to the cure or prevention of a substantial evil. The fact that the Civil Rights Acts were directed to prior abuses of state law and state officials fails to indicate that Congress intended private actions to remain ripe interminably or that the federal courts could not be trusted to select appropriate state limitations statutes.

Plaintiffs point out that Congress enacted a one-year limitation for actions based upon the "passive accessory" provision of Section 6 of the 1871 Civil Rights Act (42 U. S. C. § 1986). They argue that the failure of Congress to enact a specific limitation applicable to any other provision of the Civil Rights Acts of 1866, 1870 or 1871, indicates an intent that no statutory limitation should apply. We disagree. 'A fairer interpretation of the import of Congress' 1871 action would be the desire to insure that actions against "passive accessories" must be brought in a relatively short time after any injury has been suffered. Con-

gress has never demonstrated any wish for unlimited actions or (apart from Section 1986) uniform standards of limitation in this area of the law.

Similarly, we refuse to read into Section 3 of the 1866 Civil Rights Act, now 42 U. S. C. § 1988, any antipathy to the adoption of appropriate state statutes of limitations in civil rights actions.[6] Plaintiffs contend that Section 1988 limits the use of state common or statutory law in civil rights actions to those local rules which assist or extend the plaintiffs in vindicating their rights. As such, they argue, it bars the adoption of state laws of limitation of actions which cut off otherwise meritorious claims because of a lapse of time. We are reluctant to construe Section 1988 so broadly in the face of the well settled practice of adopting state limitations periods for federal law. Congress would surely have spoken more explicitly had it intended that civil rights actions should endure forever or be subject only to laches, regardless of the nature of the claim presented.

No conflict appears between Section 1988 and the application of state limitations acts in civil rights cases. That Section provides for the use of state law as a supplement

6. Section 3 of the 1866 Civil Rights Act provides in pertinent part:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. * * *"

to the remedial powers of federal district courts. Cf. *Sullivan* v. *Little Hunting Park*, ...U. S. ..... It is addressed to those cases in which existing federal practice falls short of accomplishing the purposes of the Civil Rights Acts because the courts otherwise lack the power to bring about the appropriate results. This function does not vary the application of appropriate substantive state laws ordinarily adopted by federal courts to fill gaps in federal substantive law. We find no indication that Congress intended Section 1988 to perpetuate such hiatuses because, in particular instances, plaintiffs' claims might be barred for failure to comply with state law. In truth, Section 1988 was designed to supplement but not supplant the Rules of Decision Act. Cf. *In re Stupp*, 23 Fed. Case No. 13,563, p. 296 at 299, 12 Blatchf. 501 (Cir. Ct., S. D. N. Y. 1875); *Schatte* v. *International Alliance*, 70 F. Supp. 1008, 1010 (S. D. Calif. 1947), affirmed, 165 F. 2d 216 (9th Cir. 1948), certiorari denied, 334 U. S. 812.

Section 1988 is inapplicable where substantive law denies a plaintiff any right to relief. All rules which affect the right of recovery necessarily affect its "remedy." That does not mean, however, that all such rules must necessarily be considered "remedial" within the purview of Section 1988. We reject the position, apparently urged by plaintiffs, that the bar imposed by a statute of limitations is remedial because, like survivorship, it affects the ultimate right to any recovery at all. Cf. *Brazier* v. *Cherry*, 293 F. 2d 401 (5th Cir. 1961), certiorari denied, 368 U. S. 921; *Pritchard* v. *Smith*, 289 F. 2d 153, 157 (8th Cir. 1961).[7] Since

7. To the extent that these two rules are not properly distinguishable, we believe that Section 1988 was unnecessarily and inaptly relied upon as the justification for the adoption of state survival law in federally based actions. As the opinion in *Pritchard* v. *Smith* conclusively indicates, other areas of federal law quite readily adopted state survival rules for application to federal statutes which contained no provision resembling Section 1988 (including the Jones Act, the Merchant Marine Act, the F. E. L. A.,

Section 1988 was not employed here to adopt any state remedial rules, it has no relevance to the instant case.[8]

Our conclusion finds further support in the long vitality of the Supreme Court's decision in *O'Sullivan* v. *Felix*, 233 U. S. 318, which was again recently cited with approval in *United Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 704. Legislative inaction is, to be sure, a poor token of Congressional intent. Nevertheless, in this area of the law, as stated in *Hoosier Cardinal Corp.*,

> "* * * when Congress has disagreed with such an interpretation of its silence, it has spoken to overturn it by enacting a uniform period of limitations." 383 U. S. at p. 704.

We therefore hold that the application of state statutes of limitation to federal causes of action under the Civil Rights Acts is consistent with Congress' intent as expressed in the relevant statutes and violates neither the due process nor equal protection clauses. We adhere to our decision in *Wakat* v. *Harlib*, 253 F. 2d 59 (7th Cir. 1958), and turn to the law of Illinois to determine the appropriate statute of limitations as to Count I of the instant cases.

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and even the Sherman Act. The result of *Brazier* and *Pritchard* has firm basis in federal law and policy quite apart from any reference to Section 1988. While many of the comments contained in those cases concerning the nature of Section 1988 are well considered, the decisions do not necessarily depend upon that statute.

8. Compare *Hughes* v. *Smith*, 264 F. Supp. 767, 769 (D. N. J. 1967), where Section 1988 was itself employed as the basis for the application of the state's statute of limitations to bar an action brought under 42 U. S. C. § 1983. The point was conceded on appeal and the decision was affirmed by the Third Circuit, 389 F. 2d 42 (1968).

The Applicable State Statute of Limitations Is Section 15 of the Illinois Limitations Act.

Turning to the various Illinois statutes of limitations, plaintiffs contend that the trial court erred in selecting Section 15 of the Illinois Limitations Act (Ill. Rev. Stat. (1967) ch. 83, § 16). They argue that the applicable provision should be either Section 12.1, dealing with actions regarding real estate, or Section 16, governing actions on written contracts (Ill. Rev. Stat. (1967) ch. 83, §§ 12.1 and 17).[9]

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9. The statutory sections read:

16. Oral contracts—Arbitration awards—Damage to property—Possessory actions—Civil actions.] § 15. Except as provided in Section 2-725 of the "Uniform Commercial Code", enacted by the Seventy-second General Assembly, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

12.1 §1. 40 year limitation on claims to real estate.) No action based upon any claim arising or existing more than 40 years before the commencement of such action shall be maintained, either at law or in equity, in any court to recover any real estate in this state or to recover or establish any interest therein or claim thereto, legal or equitable, against the holder of the record title to such real estate when such holder of the record title and his grantors immediate or remote are shown by the record to have held chain of title to said real estate for at least 40 years before the action is commenced, unless such claimant, by himself or by his attorney or agent, or if he be a minor or under legal disability, by his guardian, conservator, trustee, either parent, or any other person acting in his behalf shall within 40 years after the claim upon which such action is based arises, file in the office of the recorder of deeds of the county wherein such real estate is situated, a verified statement definitely describing the real estate involved, the nature and extent of the right or interest claimed, and stating the facts upon which the same is based; Provided, however, that the holder of the record title to such real estate shall not be entitled to the protection of this Act if the real estate is in the adverse possession of another.

For purposes of this section an unborn or unascertained person

In *Wakat* v. *Harlib*, 253 F. 2d 59 (7th Cir. 1958), this Court held that Section 15 was the applicable state statute of limitations for actions based upon 42 U. S. C. §§ 1983 and 1985:

> "A statutory right of action is a 'civil action not otherwise provided for' within the meaning of § 15 of the limitation act and is governed by the five-year statute." 253 F. 2d at p. 63.

Although the present action is based upon Section 1982 of the Civil Rights Act rather than Sections 1983 and 1985, it too is a cause of action created by statute. As such, we must agree with defendants and the district court that the rationale of our decision in *Wakat* governs and compels the application of Section 15 of the Illinois Limitations Act to Count I of each of the present actions.[10]

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may be a claimant and a verified statement may be filed on his behalf as hereinbefore provided.

For the purposes of this Act, any person who holds title to real estate by will or descent from any person who held the title of record to such real estate at the date of his death or who holds title by decree or order of any court, or by deed issued pursuant thereto, i.e., by trustee's, trustee's in bankruptcy, conservator's, guardian's, executor's, administrator's, receiver's, assignee's, master's in chancery, or sheriff's deed shall be deemed to hold chain of title the same as though holding by direct conveyance.

17. Writings—New contract.] § 16. Except as provided in Section 2-725 of the "Uniform Commercial Code", enacted by the Seventy-second General Assembly, actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within 10 years next after the cause of action accrued; but if any payment or new promise to pay shall have been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the period of 10 years, then an action may be commenced thereon at any time within 10 years after the time of such payment or promise to pay.

10. Plaintiffs apparently do not contest the holding below that *Baker* Count II, based upon the federal antitrust laws, is governed by the federal four-year antitrust statute of limitations. U. S. C. § 15b. Likewise, no objection has been raised to the application of the four-year statute of limitations provided by state law to Count III of the complaint based upon the Illinois state antitrust statute. Ill. Rev. Stat. (1967) ch. 38, § 60-7.

The Limitations Rulings Are Not Premature.

Where a complaint reveals that some claims are barred from recovery by limitations, they may be disposed of on a motion to dismiss. *Kincheloe* v. *Farmer*, 214 F. 2d 604, 605 (7th Cir. 1954); certiorari denied, 348 U. S. 920; *Anderson* v. *Linton*, 178 F. 2d 304, 309-310 (7th Cir. 1949). In many instances insufficient facts are contained in the complaint to afford an adequate basis for determining this issue. In the present case, however, despite allegations of conspiracy and concealment contained in the complaints, the court below concluded in each case:

> "The instant complaint, it should be noted, does present sufficient background for immediate determination of the limitations question. Moreover, considering the scope of the present litigation and the consequent magnitude of the discovery to be undertaken, it is particularly desirable that there be expeditious definition of the exact limits of the litigation in order to avoid unnecessary complexity and expense." 300 F. Supp. at pp. 218-219.

Plaintiffs argue that this ruling was improper in light of the allegations of their complaints. They contend that the alleged conspiracies preclude the passage of the limitations statute for all members of the classes until the last overt conspiratorial act has been disclosed. They also argue that the complaints contain allegations that the defendants concealed fact underlying the cause of action, thus tolling the statute. We feel, however, that the scope of further litigation should be delineated and confined within definite time limitations at this initial stage. This will facilitate disposition of the basic elements of the controversy and still allow for individual variations, exceptions and expansions as justice requires. We agree with the district court that at present insufficient basis has been presented for tolling the statute of limitations.

Bald allegations of conspiracy and concealment do not warrant delay in disposing of the question of the applicability of the statute of limitations. The statute of limitations does not toll automatically. *Morgan* v. *Koch*, ... F. 2d ....., ... (7th Cir. 1969). The allegation of a conspiracy alone is not an adequate basis from which fraudulent concealment may be inferred. *Laundry Equipment Sales Corp.* v. *Borg-Warner Corp.*, 334 F. 2d 788, 792 (7th Cir. 1964). Where courts have tolled limitations periods because of the existence of a conspiracy, the basis for the action has been the inherently secret nature of the conspiracy involved and its necessity as an element in the cause of action. Cf. *Allis-Chalmers Mfg.* v. *Commonwealth Edison Co.*, 315 F. 2d 558, 562 (7th Cir. 1963).

In order to obtain the shelter of the federal doctrine of fraudulent concealment, plaintiffs must be prepared to adduce sufficient evidence to warrant the conclusion that defendants concealed the basic facts disclosing the existence of a cause of action and that plaintiffs remained in ignorance of those facts through no fault of their own. *Bailey* v. *Glover*, 88 U. S. 342, 349. Where, as in the case of many conspiracies in violation of federal antitrust laws, the wrong is self-concealing, little need be added in order to justify tolling the statute. In the present case, however, we are persuaded that the language of Judge Friendly in *Moviecolor Limited* v. *Eastman Kodak Company*, 288 F. 2d 80, 87-88 (2d Cir. 1961), is fundamentally applicable:

> "Although the complaint liberally uses the adverb 'fraudulently' as to defendants' conduct, such allegations are not enough to make out a case of concealment. The Complaint is inconsistent with any view either that plaintiff did not know of its injury in signing away its rights to the Keller-Dorian process, see Developments in the Law—Statutes of Limitations, 1950, 63 Harv. L. Rev. 1177, 1221, or that it did not know of the actions of the defendants and of French

and American Keller-Dorian that led up to that. The case is thus quite unlike those in which a defendant has concealed the transaction sued upon, Bailey v. Glover, supra; Rosenthal v. Walker, 1884, 111 U. S. 185, 4 S. Ct. 382, 28 L. Ed. 395, or the facts rendering a known transaction actionable, Traer v. Clews, 1885, 115 U. S. 528, 6 S. Ct. 155, 29 L. Ed. 467; Exploration Co. v. United States, 1918, 247 U. S. 435, 38 S. Ct. 571, 62 L. Ed. 1200; United States v. Diamond Coal & Coke Co., 1921, 255 U. S. 323, 41 S. Ct. 335, 65 L. Ed. 660, or his own identity, Holmberg v. Armbrecht, supra. Mere ignorance of evidence on which to establish a claim is not enough, even if the complaint here could be read as alleging that. Tinkoff v. United States, 7 Cir., 1954, 211 F. 2d 890; Dawson, Fraudulent Concealment and Statutes of Limitation, 1933, 31 Mich. L. Rev. 875, 916. Even if no affirmative act of concealment is required in restraint of trade conspiracy cases, see Dawson, supra, at 880, 907-08; American Tobacco Co. v. People's Tobacco Co., supra; cf. 63 Harv. L. Rev. at 1221, in contrast to the usual rule where there is no fiduciary relationship, a point we do not decide, there is no allegation that plaintiff did not know in the late 1920's and early 1930's whatever the facts were as to joint action by defendants. Viewed with the benevolence proper on a motion under F. R. Civ. Proc. 12(c), the complaint does not make out, indeed it rather negatives, concealment. Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., supra; we do not read Crummer Co. v. DuPont, supra, as pointing to a contrary result."

Here there is no indication in the complaints that defendants concealed from plaintiffs or that plaintiffs actually lacked knowledge of the facts disclosing the discriminatory sales practices upon which this case rests. There is no allegation that defendants attempted to create or perpetuate an erroneous impression in the minds of the plaintiffs that the homes were being sold to them at the same price, on the same terms, and under the same conditions

as they would be sold to whites. However, in order to insure that individual members of the plaintiff classes are not unfairly deprived of relief because the facts of their particular cases may differ from those of the classes as a whole, they should have an opportunity to display the necessary concealment at a subsequent date should the merits of the complaints be upheld.[11]

The Statutes of Limitations Do Not Begin to Run Until Each Contract Terminates.

After careful consideration, the district court concluded that the three statutes of limitations commenced running only upon the termination of the individual contracts. The court stated that the defendants "are alleged to have been reaping the unlawful benefit through continued enforcement of their unlawful scheme." 300 F. Supp. at p. 220. We agree with this conclusion.

Plaintiffs have alleged wrongs committed by defendants which continue during the entire lives of the individual purchase contracts. They have alleged a conspiracy among defendants, the object of which was the establishment of continuing relationships with individual plaintiffs. That relationship, by the same token, constituted a prolonged and continuing invasion of the rights of the purchasers. As in *Hazeltine Research, Inc.* v. *Zenith Radio Corporation*,

11. The complaints also contain scattered allegations supporting the contention that certain courses of wrongful conduct engaged in by defendants were fraudulently deceptive and concealed. While we are not called upon to pass upon the merits of the claims or upon the effect of the individual allegations of fraudulent concealment, we note that reconsideration of the applicability of the statute of limitations may be in order insofar as its application is sought to certain members of the classes with regard to some peripheral wrongs. Thus the district court may be called upon to decide whether the alleged concealment of the appraised value of the mortgaged property of plaintiffs calls for recovery and tolling of the statute of limitations. Likewise, the misrepresentation of compliance with building codes may support recovery and require that, as to certain plaintiffs, the statute be tolled.

..... F. 2d ..... (7th Cir. 1969), the limitations periods commence to run from the last overt act of the conspiracy, permitting plaintiffs to recover "for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-[limitation] period acts occuring in the damage period" (..... F. 2d at p. .....). Because of the continuing nature of the overt acts alleged, the statutes of limitations do not commence to run when the contracts were executed but when they terminate. *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 502, n. 15.

Defendants are incorrect when they argue that here, as in *Emich Motors Corporation* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956), and *Baldwin* v. *Loew's Inc.*, 312 F. 2d 387 (7th Cir. 1963), only a single act was involved. In *Emich*, this Court concluded that the announcement by General Motors that Emich's dealership was to be cancelled and the actual cancellation of the leadership were so contiguous in time and of such a unitary character as to present but a single invasion of the rights of the plaintiff. And in *Baldwin*, acts of defendants which terminated outside the limitation period caused plaintiff to enter a lease with the third party. As those cases disclose, the touchstone of our inquiry must be the nature and extent of defendants' behavior, not the duration of plaintiff's injury. Here the defendants have entered into a series of contracts which manifest an on-going relationship between the individual participants and constituting the alleged invasion of the rights of the plaintiffs.

For the foregoing reasons, the limitations portions of the district court's orders are affirmed.[12]

12. Defendants' objection to the filing of plaintiffs' reply brief is overruled. In Nos. 17750-17751, defendants' motion for taxing the costs of printing the opinion below in their appendix is granted but only as to printing the parts of the opinion not relating to the statute of limitations.

APPENDIX C.

UNITED STATES DISTRICT COURT.
Northern District of Illinois,
Eastern Division.

CHARLES and CHARLENE BAKER, et al., Plaintiffs, v. F & F INVESTMENT, et al., Defendants.	69 C 15.
and	
SIDNEY and JULIA CLARK, et al., Plaintiffs, v. UNIVERSAL BUILDERS, INC., et al., Defendants.	69 C 115.

Before SWYGERT, Circuit Judge, and DECKER and WILL, District Judges.

OPINION.

WILL, District Judge. Plaintiffs are before this Court challenging the constitutionality of the Illinois Forcible Entry and Detainer Act (Ill. Rev. Stat. Ch. 57, Sec. 1). Their application for a declaratory judgment and injunction from this Court arises out of a suit in the federal district court in which plaintiffs have alleged that, through the sale of houses on contract, defendants exploited *de facto* racial segregation in the City of Chicago to charge negroes more than white persons would have been charged for similar residential real estate. The district court held

that plaintiffs could maintain the action as a class action, *Contract Buyers League* v. *F & F Investment*, 48 F. R. D. 7 (N. D. Ill. 1969), and also held that plaintiffs stated a cause of action under Section 1982 of the Civil Rights Act of 1866 and under the federal antitrust laws, *Contract Buyers League* v. *F & F Investment*, 300 Fed. Supp. 210 (N. D. Ill. 1969).

Prior to the filing of the suit in the district court, some of the persons later to become members of the plaintiff class had engaged in a payment strike against defendants. After the suit had been filed and pending in the district court for a few weeks, discussions among the parties and the court led to an order negotiated primarily by counsel for the parties with some assistance from the court and agreed to by counsel for defendants and plaintiffs, whereby plaintiffs would make their contract payments as they became due.

In *Baker, et al.* v. *F & F Investment, et al.*, involving contracts of various ages for the purchase of used residential real estate, it was agreed that defendants would deduct from the monthly payments real estate taxes and insurance pro rata, as well as any mortgage payments for which they were obligated, with one-half of the remainder of the moneys paid being placed in escrow to protect any potential final relief for plaintiffs and the other one-half being retained by the sellers to cover their expenses.

In *Clark, et al.* v. *Universal Builders, Inc., et al.*, involving relatively new contracts for the purchase of recently constructed residential units, it was agreed that sellers might retain the entire monthly payments since the difference between the aggregate pro rata amounts for taxes and insurance plus their monthly mortgage obligations and the total monthly payments was relatively small. A principal reason for this was that the sellers' mortgages

are for shorter terms than the length of the sales contracts. This results in the monthly mortgage amortization payments being larger with the profit to the sellers resting in the payments to be made towards the end of the contracts after the mortgages have been liquidated. It was agreed that the aggregate amount of future payments on these relatively new contracts was sufficient to protect plaintiffs in any potential relief and that, therefore, no escrow of any portion of the present payments was necessary or desirable.

The district court also continuously exercised its jurisdiction to insure that no member of the plaintiff classes who presented a personal "hardship" situation would be evicted by the defendants. "Hardship" was established where, because of illness, unemployment or some other adversity, a member of the plaintiff class needed some minor readjustment in the schedule of payments, or an opportunity to amortize arrearages on a reasonable basis pending a final determination of the merits of their case.

Thereafter, notwithstanding the agreement with the defendants and the district court, some plaintiffs resumed their payment strike asserting that the judicial process was not proceeding speedily enough to satisfy them although the case was being handled on an expedited emergency basis and almost every request for relief from dates and timetables set by the court was made by plaintiffs' counsel. Ironically, many of the concededly substantial demands of the time, energies and talents of the plaintiffs' counsel which have delayed discovery in the basic suits were the result of the payment strike and the eviction proceedings, appeals and the instant three-judge case resulting therefrom.

After resumption of the payment strike, the plaintiffs represented to the district court that the monthly pay-

ments would be paid to the Contract Buyers' League, an unincorporated association of plaintiffs, and held by this organization pending disposition of the basic suits. Specifically, plaintiffs petitioned for injunctive relief to stay eviction proceedings which defendants had launched when plaintiffs resumed the payment strike. The district court denied such relief, as did the lower state courts. A motion for the same relief was filed before the United States Court of Appeals for the Seventh Circuit, and was denied. A similar motion was filed before Justice Thurgood Marshall of the United States Supreme Court and denied. It was refiled with Justice William O. Douglas of the United States Supreme Court who referred it to the entire Court, and the United States Supreme Court subsequently also denied the requested stay of the eviction proceedings.

Plaintiffs then moved before the district court judge that he convene a three-judge court to consider the constitutionality of the Illinois Forcible Entry and Detainer Act (Ill. Rev. Stat. Ch. 57, Sec. 1), the state statute under which the evictions were proceeding. The district court judge granted the motion, and this Court was convened.

On January 2, 1970, plaintiffs filed a motion that this three-judge court enter a temporary injunction restraining defendants from taking any action under the Illinois statute against any members of the plaintiff class. After hearing and oral argument and considering the briefs submitted by counsel, this Court found, on January 5, 1970, that a substantial question had been raised whether this Court should abstain from passing upon the constitutionality of the Illinois law pending an adjudication of this same question by the Illinois courts. We reserved ruling upon the plaintiffs' motion for a temporary injunction pending further argument to the Court.

On January 7, 1970, the plaintiffs appeared before two

Justices of the Illinois Supreme Court and presented motions to transfer two cases from the Appellate Court of Illinois to the Supreme Court of Illinois to be consolidated with a case already pending in the Supreme Court of Illinois, and to expedite the consolidated challenge to the Illinois Forcible Entry and Detainer Statute by providing for an accelerated briefing schedule. Plaintiffs also requested an injunction against evictions. The Illinois Supreme Court took these motions under advisement. On January 22, the Illinois Supreme Court granted plaintiffs' motion to consolidate the cases, denied plaintiffs' specific suggestion for a briefing schedule, but set the cause for early hearing at the head of the Court's calendar for March 10, 1970. The Illinois Supreme Court refused the requested injunctive relief. It stated as its reason that plaintiffs "have not offered any equitable plan to protect the rights of the adverse parties involved in these actions during the pendency of these cases."

Plaintiffs subsequently presented a motion for reconsideration of this refusal to stay evictions. On January 28, the Illinois Supreme Court responded by affirming plaintiffs' obligations under the arrangements previously entered into in the federal district court. The Court denied the motion for reconsideration stating that the petition "does not set forth sufficient grounds to cause this court to enter an order which would require less equitable performance by the plaintiffs-appellants than an order heretofore entered by the U. S. District Court. . . ."

Regarding the motion for a temporary injunction presently before this Court, we too find that there is no justification for the requested preliminary relief. It is Hornbook law that a state statute is presumed constitutional until proven otherwise. Certainly a state statute cannot be presumed unconstitutional—which presumption is the

necessary implication of plaintiffs' motion. Plaintiffs argue that, pending a determination of the constitutionality of the Illinois Forcible Entry and Detainer Act, members of the plaintiff class may suffer the irreparable injury of eviction. However, from the beginning of their payment strike, plaintiffs have insisted that they were seeking the requested injunctive relief only for persons who had the money for the current payments available to them and could make the payments, but chose not to do so. Somewhat belying this representation to the federal district court, plaintiffs have since represented to the Illinois Supreme Court, in justification of their appeal to that Court, that some plaintiffs could not in fact and were not in fact making payments to the fund being collected by the Contract Buyers League. But whether members of the plaintiff class are or are not making their payments to the League, injunctive relief cannot be granted. If the payments can be and are being collected, there is no basis for a claim of irreparable injury since plaintiffs can alleviate their distress by making the payments as originally agreed in the district court proceedings. In this regard it has always been in plaintiffs' own power to avoid eviction. If the payments are not being collected, we cannot grant injunctive relief which would constitute judicial approval of plaintiffs' unilateral abrogation of the agreement with the district court and the defendants. Moreover, its consequences would be to penalize defendants before there is any proof of the merits of plaintiffs' claims against them. This is the fundamental point that appears to have been recognized by the various courts before which there have been applications for injunctions against the eviction proceedings.

Plaintiffs have suggested that without the payment strike, they would lack the standing necessary to question the constitutionality of the Illinois Forcible Entry and

Detainer Act. But a general payment strike involving hundreds of contracts was not necessary to create a test case. Indeed, as previously noted, there was already pending in the Illinois Supreme Court a case challenging the constitutionality of the Illinois Forcible Entry and Detainer Act with which the two cases involving members of the plaintiff classes have been consolidated by the Illinois Supreme Court for expedited consideration.

Moreover, we disagree that plaintiffs would have lacked standing without actual eviction proceedings, since even under the former agreement with the defendants, plaintiffs were under a direct threat of eviction as a cost of noncompliance with the agreement. Plaintiffs have asserted their reliance on *Golden* v. *Zwickler*, 394 U. S. 103 (1969). But *Golden* is simply inapposite. The facts of that case established that the prospect of prejudice to the rights asserted was neither real nor immediate, but rather, wholly conjectural. The Supreme Court repeated the well-established proposition that "the constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." *Id.* at 110. In the instant case, it is obvious from the history of eviction proceedings and the ever-present threat of eviction if payments are not made, that the plaintiffs, at any and all times since the beginning of their challenge to the contracts of sale, did have standing to assert their constitutional challenge to the Illinois statute.

We previously found that a substantial question had been raised as to whether this Court should abstain from passing upon the constitutionality of the Illinois Forcible Entry and Detainer Act because it appeared that by abstaining this Court might avoid unnecessary constitutional decision and unnecessary conflict with the state courts, the original rationale for the doctrine of abstention as articu-

lated by Justice Frankfurther in *Railroad Com'n* v. *Pullman Co.*, 312 U. S. 496, 500 (1941). Plaintiffs themselves admit in their argument to this Court that the Illinois Supreme Court may give to the word "germane" in Section 5 of the Forcible Entry and Detainer Act a more liberal construction than the Illinois Appellate and trial courts have, and the Court may also hold that appeals by evicted defendants should not be dismissed even though appeal bonds are not filed. In this fashion, by statutory construction, the Supreme Court of Illinois may resolve two of the fundamental constitutional objections to the Forcible Act.

Plaintiffs go on to argue that, nevertheless, all of the constitutional objections they have asserted cannot be disposed of by statutory construction. In particular, they point out that statutory construction cannot dispose of their contention that the time periods provided under the Act, as compared to those in other classes of litigation, are violative of the equal protection clause; or that the time periods are so short as to violate the due process clause.

But plaintiffs make the mistake of assuming that because construction of a state statute may not render constitutional determinations wholly unnecessary, federal abstention may not be appropriate and desirable. Plaintiffs offer no support for such an assumption, and indeed, the rule is quite the contrary. It is expressed in the very language from *Harmon* v. *Forssenius*, 380 U. S. 528 (1965), which plaintiffs quote in making their argument,

> In applying the doctrine of abstention, a federal district court is vested with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law. *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496. Where resolution of the federal consti-

tutional question is dependent upon, *or may be materially altered by*, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication. *E.g., Railroad Comm'n* v. *Pullman Co., supra.* The doctrine, however, contemplates that deference to state court adjudication only be made where the issue of state law is uncertain. *Davis* v. *Mann*, 377 U. S. 678, 690; *McNeese* v. *Board of Education*, 373 U. S. 668, 673-74; *Chicago* v. *Atchison T. & S. F. R. Co.*, 357 U. S. 77, 84. If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary *or substantially modify the federal constitutional question*, it is the duty of the federal court to exercise its properly invoked jurisdiction. *Baggett* v. *Bullitt*, 377 U. S. 360, 375-379. Thus "recognition of the role of state courts as the final expositers of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 415-416.[1]

In other cases, the United States Supreme Court has repeated what is expressed above—that abstention may be appropriate not merely where the determination of issues of state law may wholly avoid the constitutional questions presented, but also where such determination may "materially alter" or "substantially modify" the federal constitutional questions. As *Harmon* v. *Forssenius* illustrates, civil rights cases have been no exception to this rule. *See, Zwicker* v. *Koota*, 389 U. S. 241, 245-252 (1967); *Harrison* v. *NAACP*, 360 U. S. 167, 175-179 (1959). Note, *Federal Question Abstention*, 80 Harv. L. Rev. 604, 618-619 (1967).

1. Emphasis added.

As is clear from plaintiffs' own description, the disposition of the questions of state law in the instant case may materially alter and substantially modify the constitutional issues presented. Also, it may be noted that this case does not present the situation which makes abstention improper under *Turner* v. *City of Memphis*, 369 U. S. 350 (1962). In *Turner*, the Court was presented with a state statute which obviously violated federal constitutional rights and declared, "our decisions have foreclosed any possible contention that such a statute or regulation may stand consistently with the Fourteenth Amendment." *Ibid.*, at 353. As is obvious from plaintiffs' own observations in the instant case that construction of the state statute may dispose of at least some of the critical constitutional objections raised in the motion to convene the three-judge court, there is no such patent unconstitutionality presented in the instant case as there was in *Turner*.

Plaintiffs are correct to point out that, in recent development of the doctrine of abstention, the Supreme Court has been restricting the application of the doctrine, particularly in cases involving fundamental constitutional rights. A primary reason for so restricting the doctrine has been the concern to avoid delay that is likely to be occasioned in moving litigation from the federal court to the state court. *See, Harmon* v. *Forssenius*, 380 U. S. 528, 537 (1965); *Griffin* v. *County School Board of Prince Edward County*, 377 U. S. 218, 229 (1963); *Baggett* v. *Bullitt*, 377 U. S. 360, 375-379 (1963). This is especially so where freedoms guaranteed by the First Amendment are involved and the delay normally inherent in transfer to the state court can result in the undue maintenance of an unconstitutional prohibition which has a "chilling effect" on the exercise of First Amendment rights.

Dombrowski v. *Pfister*, 380 U. S. 479 (1965). As *Dombrowski* illustrates, when abstention is rejected in civil rights cases, the reason generally is that the federal interest in deciding the federal issues may be so strong as to make delay intolerable.

But the instant case is specially notable in regard to the expedition with which an authoritative disposition can be expected from the state courts. As related above, the same claims presented to this court are presently pending before the Supreme Court of the State of Illinois. Thus, abstention in the instant case does not imply the delay in obtaining an authoritative state decision that is normally a consequence of the application of federal abstention. Indeed, there is no reason to expect that we would be able to consider the merits of the claims stated any sooner than the Supreme Court of the State of Illinois, since that Court has already set the shortest briefing schedule it considered adequate for the parties to present their positions, and set a date for hearing immediately thereafter. The Supreme Court of Illinois may well pass on all the constitutional issues presented by plaintiffs. Thus, every indication is that abstention by this Court in favor of the Supreme Court of Illinois is in the interest of the most expeditious determination of the constitutionality of the Illinois Forcible Entry and Detainer Act.

We therefore abstain. However, we retain jurisdiction in order to preserve a federal forum for the adjudication of the federal constitutional issues in the event they are not disposed of, or in the event that there arises some presently unforeseen bar to obtaining an adjudication on

the merits of plaintiffs' claims. An appropriate order will enter.

/s/ LUTHER M. SWYGERT,
Luther M. Swygert, *Judge*
United States Court of Appeals

/s/ BERNARD M. DECKER,
Bernard M. Decker, *Judge*
United States District Court

/s/ HUBERT L. WILL,
Hubert L. Will, *Judge*
United States District Court

Dated: February 10, 1970.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division.

CHARLES and CHARLENE BAKER, et al., Plaintiffs, v. F & F INVESTMENT, et al., Defendants.	No. 69 C 15
and	
SIDNEY and JULIA CLARK, et al., Plaintiffs, v. UNIVERSAL BUILDERS, INC., et al., Defendants.	No. 69 C 115

Special Concurrence:

DECKER, District Judge. I concur fully in the well-reasoned opinion of Judge Will. I would add, however, one further reason why I believe this court should refuse the requested relief. Plaintiffs' amended complaints, incorporating the constitutional challenge, came nearly one year after these actions were filed. Furthermore, they followed closely on the heels of Judge Will's order denying a temporary injunction, after giving patient and careful consideration to the plaintiffs' request for such relief and after obtaining what he considered to be an agreed order by all parties.

By amending their complaints at this late date, and for the first time invoking the provisions of 28 U. S. C. § 2281, plaintiffs are in effect asking this court to reverse Judge Will's decision.

The three-judge court statute was not designed to secure

relief from the rulings of a single court judge. On this basis alone, this court might well have refused to entertain the motion for a temporary injunction.

/s/ BERNARD M. DECKER,
Bernard M. Decker,
Judge.
United States District
Court.

Dated: February 10, 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 208

UNIVERSAL BUILDERS, INC., ROSEWOOD CORPORATION, HAMILTON CORPORATION, LAWSON CORPORATION, INDEPENDENCE HOMES, INC., JARVIS HOMES, INC., CHATHAM TOWN HOMES, INC., and EARCHMONT HOME DEVELOPMENT CO.,

Petitioners,

vs.

SIDNEY and JULIA CLARK, REV. ROBERT ANDERSON, JR., DEE BALLANFANT, EDWARD and FREDDIE MAE BROWN, CLARANCE and MARY ANN CARR, ARTHUR and THELMA GREEN, CHARLES and CLEORIA HARDY, BESSIE HENDERSON, JOHN and WILLIE M. JACKSON, GREAD and NAOMI D. McKINNIS, JULIA W. MONTGOMERY, HARRY C. and MATTIE B. PELTON, JAMES and WILLIE PHELPS, ERNEST and SHIRLEY T. POWELL, JR., MRS. JOHNNIE RAMSEY, JOSEPH L. and BEVERLY THOMPSON, and WILLIAM and RUBY YOUNGBLOOD, on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BURTON Y. WEITZENFELD,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. .....

UNIVERSAL BUILDERS, INC., ROSEWOOD CORPORATION, HAMILTON CORPORATION, LAWSON CORPORATION, INDEPENDENCE HOMES, INC., JARVIS HOMES, INC., CHATHAM TOWN HOMES, INC., and LARCHMONT HOME DEVELOPMENT CO.,

Petitioners,

vs.

SIDNEY and JULIA CLARK, REV. ROBERT ANDERSON, JR., DEE BALLANFANT, EDWARD and FREDDIE MAE BROWN, CLARANCE and MARY ANN CARR, ARTHUR and THELMA GREEN, CHARLES and CLEORIA HARDY, BESSIE HENDERSON, JOHN and WILLIE M. JACKSON, GREAD and NAOMI D. McKINNIS, JULIA W. MONTGOMERY, HARRY C. and MATTIE B. PELTON, JAMES and WILLIE PHELPS, ERNEST and SHIRLEY T. POWELL, JR., MRS. JOHNNIE RAMSEY, JOSEPH L. and BEVERLY THOMPSON, and WILLIAM and RUBY YOUNGBLOOD, on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Universal Builders, Inc., Rosewood Corporation, Hamilton Corporation, Lawson Corporation, Independence Homes, Inc., Jarvis Homes, Inc., Chatham Town Homes, Inc., and Larchmont Home Development Co. petition for a writ of certiorari to review the decision of the United

States Court of Appeals for the Seventh Circuit entered on January 6, 1970.

OPINIONS BELOW.

The District Court did not file a written opinion, but stated orally that his applicable reasoning could be found in a written decision in another case, then known as *Contract Buyers League, et al.* v. *F & F Investment, et al.*, reported at 300 F. Supp. 210 and reprinted in full as Appendix A to this petition. The opinion of the Seventh Circuit is reported at 420 F. 2d 1191, and reprinted in full as Appendix B to this petition. A three-judge court, convened pursuant to 28 U. S. C. § 2281, rendered an unreported opinion on another aspect of this litigation, which is reprinted in full as Appendix C to this petition.[1] The Appendices are separately presented.

THIS COURT'S JURISDICTION.

The judgment of the Seventh Circuit was entered on January 6, 1970. With one judge dissenting, petitioners' petition for rehearing was denied by order entered on March 5, 1970. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

This is a civil rights action involving petitioners' sales of new single family homes on credit to Negroes. The Seventh Circuit's decision was rendered on interlocutory appeal

1. Other litigation between some of these parties was previously before this Court in *Durham et ux* v. *Independence Homes, Inc.*, No. 1062, Oct. Term 1969, appeal dismissed and cert. denied, ... U. S. ....., 25 L. Ed. 2d 78 (1970); appellee there is one of the petitioners here, and appellants there are two of the respondents here.

on statute of limitations issues. Petitioners wish to present the following question for review by this Court:

Whether the Seventh Circuit correctly held that a cause of action for alleged discrimination in the price and terms of a long-term contract to purchase real property does not accrue when the contract is signed, but only when it is fully performed—32 years later in some instances.

STATUTES INVOLVED.

(a) Illinois Limitations Act, L. 1871-2, p. 556, Section 15, as amended; 1969 Ill. Rev. Stats., Ch. 83, Par. 16:

> "Except as provided in Section 2-725 of the 'Uniform Commercial Code,' approved July 31, 1961, as amended, and Section 11-13 of 'The Illinois Public Aid Code,' approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and *all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.*" (Emphasis supplied).

(b) Civil Rights Act of 1866, 14 Stat. 27, Section 1; 42 U. S. C. § 1982:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

STATEMENT OF THE CASE.

(a) The Parties.

Since January, 1958 petitioner Universal Builders, Inc., built, and the other seven petitioners sold, approximately 1,300 all brick, new, three and four-bedroom single family homes on the far South Side of Chicago (A. 10, 26-27).[2] Many have luxury features such as finished recreation rooms, central air conditioning and built-in intercom systems. While a majority of the sales were made under installment contracts for deed providing for a specified down payment with the balance of the purchase price payable in monthly installments over a period of years, petitioners also sold these houses for cash to customers who had obtained financing from third persons.

The respondents are members of a class consisting of Negroes who purchased these homes pursuant to installment contracts for deed, on which at least one monthly payment was made since January 20, 1964 (five years prior to the filing of this suit). The District Court ruled that this is a proper class action under Rule 23, Federal Rules of Civil Procedure, and simultaneously ruled on petitioners' statute of limitations motion by defining the class to exclude petitioners' Negro customers whose contracts with petitioners were not in force at any time during the five years immediately preceding the filing of the complaint (A. 76-77).

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2. Record references herein will be made as follows. Pages of the printed Appendix filed in the Seventh Circuit will be designated by the prefix "A." Material in the record on appeal certified to the Seventh Circuit by the District Court but not reproduced in the Appendix will be designated by the prefix "R.", followed by the page reference.

(b) The Installment Contracts.

Specimen copies of the installment contracts in the record (R. 98-145, 150-153; A. 22-25, 28-35) disclose that petitioners agreed to construct and sell new houses for prices ranging from $22,450 to $29,400, with down payments of about 10%, and with the balance of the purchase price payable in specified monthly installments (as low as $139) "or more"[3] to be applied first to interest on the balance outstanding each month at annual rates of 6½% to 7% (simple), and then to principal. A buyer making only the minimum payments required by his contract would amortize the deferred balance of the purchase price in 23 to 32 years. The installment contracts also require the buyers to make monthly deposits for real estate taxes and hazard insurance premiums[4] and to pay any assessments made against the property.

Petitioners' contract customers do not obtain legal title until the purchase price has been paid in full.[5] Under the contracts, a buyer later desiring to do so may, at any time, exercise the unlimited prepayment privilege without penalty, pay petitioners the outstanding balance of the purchase price, and thus terminate the contract and obtain title to the property. To date, the purchasers of approximately 350 of the houses which petitioners originally sold on contract have exercised their prepayment privilege to termi-

3. The quoted words confer upon the buyer an unlimited privilege to prepay, in whole or in part, at any time without penalty.

4. Each buyer is required by Paragraph 5 of his contract to insure the property for at least the unpaid principal balance. *E.g.*, A. 29.

5. The buyer may not record his interest until one-third of the purchase price has been paid, may not repair, alter or improve the property without the seller's consent, and may not transfer or assign his interest in the property or in the contract itself without the consent of the seller which may not unreasonably be withheld. *E.g.*, A. 29.

nate their contracts by paying the principal balance, and title has been conveyed to them (an affidavit appearing at A. 26-27 refers to 300 such prepayments, and approximately 50 additional prepayments have been made since that affidavit was filed).

The seller's remedies for a default of a buyer which persists for 30 days include the right to terminate the contract. The procedure for retaking the property after such contract termination, is established by the Illinois Forcible Entry and Detainer Act, R. S. 1874, p. 535; 1969 Ill. Rev. Stats., Ch. 57, § 1 et seq. The Act requires that the trial court stay issuance of the writ of restitution in all cases, with a six-month stay mandatory in some cases. While the writ is stayed, a defaulting buyer may cure any defaults and thereby reinstate his contract as if no default had occurred. 1969 Ill. Rev. Stats., Ch. 57, § 13.

(c) Use of Installment Contracts in Illinois.

Real property has been sold in Illinois under such contracts by owners willing to accept payment in installments for at least 96 years. When first enacted in 1874, the Illinois Forcible Entry and Detainer Act expressly recognized this method of buying and selling real property and conferred upon a contract seller the right to maintain an action for possession against a defaulting contract buyer. That provision remains in the Act today. 1969 Ill. Rev. Stats., Ch. 57, § 2 (Fifth). The continued widespread use of such contracts was observed by the Supreme Court of Illinois in 1962 when it said "[i]t is a matter of common knowledge . . . that contracts for deed are useful to and increasingly used in our society." *Shay* v. *Penrose*, 25 Ill. 2d 447, 450-51, 185 N. E. 2d 218 (1962).

(d) The "Cause of Action" Alleged.

The complaint in this case was filed on January 20, 1969 (R. 2-49) in the United States District Court for the Northern District of Illinois, by the named plaintiffs in their own behalf and as representatives of the class.[6]

The complaint alleges that petitioners sold houses to the plaintiff class members under contracts for deed at higher prices and on less favorable terms and conditions than "would have been available" to white persons (A. 11, 10) in violation of 42 U. S. C. §§ 1981, 1982, 1983 and 1985(3), and the Thirteenth and Fourteenth Amendments to the United States Constitution.[7] The jurisdiction of the District Court was invoked under 28 U. S. C. § 1343 (A. 4).

Notwithstanding the absence of any allegation that any of the petitioners had actually refused to deal with anyone because of race,[8] or had actually offered to sell or sold for any different prices or on any different terms and conditions to anyone because of race, the District Court denied a motion to dismiss the civil rights claim (R. 50-51), holding that the complaint stated a claim under 42 U. S. C. § 1982 and considered it unnecessary to decide whether claims were also stated under the Thirteenth and Fourteenth Amendments and under 42 U. S. C. §§ 1981, 1983 and

6. An unincorporated voluntary association known as Contract Buyers League was also named as a plaintiff and was dismissed as a party on petitioners' motion. A. 76; App. A at A35-A39; 300 F. Supp. at 230-232.

7. The complaint also charged violation of the federal securities laws and fraud, unconscionability and usury in violation of Illinois law (R. 27-38) which other charges were dismissed on petitioners' motion. A. 76; App. A at A22-A33; 300 F. Supp. at 223-229.

8. Petitioners do not dispute that they sold most of their houses to Negroes. However, petitioners in fact also sold to whites for the same prices and on the same terms.

1985(3)[9] (A. 76; App. A at A3-A8; 300 F. Supp. at 214-216).

(e) Proceedings Below on Statute of Limitations Issue.

Petitioners also moved to dismiss the claim of each plaintiff whose contract was signed more than five years before the complaint was filed (A. 26), on the ground that each such plaintiff's civil rights were violated, if at all, when each contract was signed and that all claims that said contracts violated plaintiffs' civil rights are barred by the controlling provision of the Illinois Limitations Act, L. 1871-2, p. 556, Sec. 15; 1969 Ill. Rev. Stats., Ch. 83, Par. 16:

> "... all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued."

The District Court correctly held that civil rights claims are governed by the Illinois five-year statute of limitations, but then ignored the requirement of the statute that the action must be commenced within five years after the cause "accrued" and held that the only persons barred by limitations are those whose contracts terminated more than five years before the complaint was filed. A. 76-77; App. A at A12-A22; 300 F. Supp. at 218-223. It was, and is petitioners' position that, if the civil rights of any member of the class were violated by contracting to sell a home to him for a "discriminatory" price or on "discriminatory"

9. Because this is an interlocutory appeal limited to statute of limitations issues, the issue whether the complaint states a claim for which relief may be granted was not before the Seventh Circuit. This petition will sometimes refer to the allegations of higher prices and less favorable terms and conditions than "would have been available" to white persons as alleged discriminatory prices and terms, but petitioners do not thereby concede and in fact deny that the complaint alleges a civil rights violation.

terms,[10] such violation occurred and the cause of action "accrued" when the contract of sale was signed because that event established and obligated the purchaser to pay the allegedly "discriminatory" price and bound him to the other allegedly "discriminatory" terms and conditions, that the action now before the Court could then have been commenced, and that whether or not a contract has been terminated is immaterial in deciding when limitations began to run against the claim that its provisions were "discriminatory".

The District Court made the findings required by 28 U. S. C. § 1292(b) for an interlocutory appeal on the limitations issues *only* (*A.* 77), and thereafter, by orders entered on June 24, 1969, the Seventh Circuit granted leave to all parties to prosecute interlocutory appeals on such issues. All parties in the separately pending case of *Baker, et al.* v. *F & F Investment, et al.*, were granted leave to prosecute interlocutory appeals on the limitations questions there presented,[11] and all such appeals were consolidated by the Seventh Circuit for purposes of briefing, argument and decision.

The Seventh Circuit correctly ruled against respondents on all of the points raised by their cross appeal and correctly affirmed the holding of the District Court that the claim under 42 U. S. C. § 1982 (the only claim the trial court let stand against these petitioners)[12] is governed by

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10. Petitioners' answer denies that they in fact sold for "discriminatory" prices and on "discriminatory" terms and conditions, and the matter has not yet been tried.

11. The *Baker* case involved the same limitations questions as the instant case and, in addition, involved questions under the federal and Illinois statutes of limitations applicable to the federal and state antitrust claims asserted there but not here.

12. In *Baker, et al.* v. *F. & F. Investment, et al.*, not involving these petitioners, the trial court left standing claims of federal and state antitrust violations.

the five-year limitation contained in Section 15 of the Illinois Limitations Act (App. B at A42-A54; 420 F. 2d at 1193-1199), but erroneously sustained the trial court's holding that the statute of limitations does ". . . *Not Begin to Run Until Each Contract Terminates.*" App. B at A54-A55; 420 F. 2d at 1200 (emphasis in original).

This decision nullifies the statutory language that limitations begins when ". . . the cause of action accrued", judicially tolls the statute on all civil rights violations which may result from the execution of long-term contracts for the entire life of the contracts, and, under a five-year statute of limitations, subjects these petitioners to suits for as long as 37 years after the contracts were executed even though such suits could have been brought the very day they were signed.[13]

Under the Seventh Circuit's decision, the time during which one is obligated to bring a civil rights action or be barred is not measured as the statute and decisions of this and other Courts hold it should be measured, from the date when the suit could have been brought, but depends upon whether the alleged discriminator extended long-term credit to the purchaser or sold for cash.

Petitioners' customers who bought the same model home in the same neighborhood at the same time and for the same price as respondents five or more years before this suit was filed, are by this decision now barred by limitations if they paid petitioners cash. On the other hand,

13. Petitioners' apprehension of such suits up to 37 years after contracts were signed is not mere speculation. The extent of participation in this class action has not yet been finally determined, but class action notices were mailed to 1,262 of petitioners' customers, and, as of March 18, 1970, only 188 had definitely elected to participate. Any or all of the other 1,074 customers may elect not to participate now (197 have already so elected), and later make the same charges as are now made, any time within the governing limitations period, which the Seventh Circuit held to be the entire life of each purchase contract plus an additional five years.

none of petitioners' customers under the hundreds of installment contracts still outstanding are barred no matter when the contracts were executed. The illogical result of this holding is further brought into focus by the fact that any contract purchaser electing not to participate in this class action may later sue petitioners at any time within 5 years after his contract is fully amortized—in some cases more than 30 years hence. Yet all of these customers, those who purchased for cash, those who purchased under existing contracts and remain members of the present class, and those who purchased under existing contracts but have or in the future elect not to remain members of this class and sue at a later date—perhaps 30 years from now—suffered the very same alleged "discrimination" on the very same day.

REASONS FOR GRANTING THE WRIT.

I.

The Seventh Circuit's Decision Conflicts With the Applicable Decisions of This Court and Illinois Courts; It Reaches Precisely the Result Which This Court Has Repeatedly Stated Statutes of Limitations Are Designed and Should Be Construed to Prevent.

The controlling statute of limitations began to run, by virtue of the express language of that statute, when "the cause of action accrued." The Seventh Circuit's decision ignored this statutory designation of the starting point for computing the period of limitations and the decisions interpreting it, and held that limitations does ". . . Not Begin to Run Until Each Contract Terminates." App. B at A54; 420 F. 2d at 1200. The result is a decision in direct conflict with a long line of decisions of both this Court and the Illinois courts holding that a cause of action accrues when one who sustains injury from an invasion of his rights may

first maintain an action against the alleged wrong doer. *Mazur* v. *Stein*, 314 Ill. App. 529, 534, 41 N. E. 2d 979 (1st Dist. 1942); *Golden* v. *Cervenka*, 278 Ill. 409, 116 N. E. 273 (1917); *McGuigan* v. *Rolfe*, 80 Ill. App. 256 (1st Dist. 1899); see *United States* v. *Atlantic Mutual Ins. Co.*, 298 U. S. 483, 488-490 (1936); *cf.*, *Crown Coat Front Co.* v. *United States*, 386 U. S. 503 (1967).

In *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638 (1918), this Court said:

> "And in this connection we cannot fail to recognize that when the statute was enacted *the time when a cause of action accrues had been settled by repeated decisions of this court to be when a suit may first be legally instituted upon it* (Amy v. Dubuque, 98 U. S. 470, 474, 25 L. ed. 228, 230; United States v. Taylor, 104 U. S. 216, 222, 26 L. ed. 721, 723; Rice v. United States, 122 U. S. 611, 617, 30 L. ed. 793, 794, 7 Sup. Ct. Rep. 1397)...." 246 U. S. at 644 (emphasis supplied).

This Court has also said:

> "In common parlance a right accrues when it comes into existence...." *United States* v. *Lindsay*, 346 U. S. 568, 569 (1954).
>
> "... We conclude that 'the cause of action accrued,' within the meaning of § 6 of the Portal-to-Portal Act, when the minors were employed. That was the violation of the Walsh-Healy Act, giving rise to the liability for liquidated damages.... *A cause of action is created when there is a breach of duty owed the plaintiff.*" *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59, 65 (1953, emphasis supplied).
>
> "*When might this action have been instituted?* is the question, for from that time the statute must run." *Wilcox* v. *Plummer*, 4 Pet. 172, 180 (1830, emphasis supplied).

Under these decisions the "cause of action" alleged in the complaint accrued as to each respondent when he signed his contract because it was at that time, if ever, that the discrimination occurred. It was then that he agreed to pay the "discriminatory" price and to be bound by the "discriminatory" terms of the contract, and at that time he could *first* have brought the very action now asserted in the complaint. All of the relief requested now—rescission, reformation, accounting, actual and punitive damages (A. 19-20)—was available then if it is available now. Hence, it was then and not when a contract terminates that the alleged "cause of action accrued."

Instead of focusing on the gist of the complaint—the charge that the contracts obligated respondents to pay "discriminatory" prices—and the controlling language of the statute in question, the court below mistakenly dwelled upon the fact that the alleged "discriminatory" prices were payable in installments, the receipt of which it variously described as "reaping the unlawful benefit through continued enforcement," "wrongs committed by defendants which continue during the entire lives of the individual purchase contracts," "continuing relationships," "a prolonged and continued invasion of the rights of the purchasers," "the continuing nature of the overt acts alleged," and "on-going relationship . . ." App. B at A54-A55; 420 F. 2d at 1199-1200.

The Seventh Circuit thus attributed a plainly improper significance to the fact that the alleged "discriminatory" price was payable in monthly installments, erroneously concluding that the time when the price is fully paid and the contract is thus terminated, rather than the time when a suit first could have been brought, marks the beginning of the period of limitations. But when a contract is terminated clearly has nothing to do with whether or not the

contract required payment of a discriminatory price. This discrimination could have occurred, if it ever occurred, only when a contract was signed, and it was then that this action could *first* have been brought, so it was then that the "cause of action accrued" and limitations began to run.[14]

That petitioners have enforced the provisions of the contracts, and collected money due, whether by prepayment or by monthly payment, and will continue to do so in the future—in some cases for 30 or more years—in no way affects the time when limitations began to run, for it has been consistently held that a cause of action for obtaining an injurious provision accrues when the contract is executed and that limitations run against such a cause from that time without regard to subsequent contract performance. *E.g., Steiner* v. *Twentieth Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956); *Fleischer* v. *A. A. P. Inc.*, 180 F. Supp. 717, 723 (S. D. N. Y. 1959); *Berry* v. *Chrysler Corp.*, 150 F. 2d 1002 (6th Cir. 1945); *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401, 406 (S. D. N. Y. 1961). The Supreme Court of Illinois has specifically held that payments made pursuant to an injurious contract do not affect the time of accrual of a cause of action for a wrong committed when the contract was

14. The two decisions upon which the Seventh Circuit relied, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), and *Hazeltine Research, Inc.* v. *Zenith Radio Corp.*, 418 F. 2d 21 (7th Cir. 1969), cert. granted, ... U. S. ....., 25 L. Ed. 2d 390 (1970), in reaching its erroneous conclusion are clearly distinguishable. Unlike those cases in which injury was caused by an antitrust violation committed during the limitations period, any "discrimination" committed against a respondent here occurred, if at all, when his contract was executed and not thereafter. Thus, the distinction specifically noted by this Court in *Hanover Shoe, supra,* is applicable. 392 U. S., n. 15 at 502.

signed.[15] *Keithley* v. *Mutual Life Ins. Co.*, 271 Ill. 584, 599-600, 111 N. E. 503 (1916).

In deciding that the statute of limitations does "... Not Begin to Run Until Each Contract Terminates" (even though the courts below did not dismiss as to those members of the class whose cause of action had not "accrued", under the decisions below, because their contracts had not terminated), the Seventh Circuit not only ignored, but indeed it defied, the mandate of the applicable statute and rendered an opinion contrary to and in direct conflict with the applicable decisions of this Court and other courts as to when a "cause of action accrued."

For this reason, review by this Court is required.

In addition, by permitting actions to be brought against petitioners as late as 37 years after the alleged wrong was committed, this decision subverts and virtually destroys the very purpose of the statute of limitations.[16] It flies in the teeth of this Court's repeated holdings that statutes of limitations are to be liberally construed in favor of repose and stability of transactions and not, as the Seventh Circuit held, in such a manner as to impose liability for acts done decades beyond the statutory period.

> "... Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. ... For these reasons and others, we have stated

15. The only thing of which respondents complain after date of execution of each contract, other than contract performance, is alleged failure to pay or credit respondents' accounts with the proceeds of insurance claims (A. 14). Even if this were true (and it is denied), it would not be a violation of 42 U. S. C. § 1982, and certainly termination of a contract would not have to occur before a respondent could bring suit for this alleged wrongdoing.

16. By the Seventh Circuit's reasoning, a civil rights action attacking an allegedly discriminatory 99 year lease could be brought 104 years after execution of the lease.

before 'the principle that criminal limitations statutes are "to be liberally interpreted in favor of repose." ' ... These principles indicate that the doctrine of continuing offenses should only be applied in limited circumstances since, as the Court of Appeals correctly observed in this case, '[t]he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term.' " *Toussie* v. *United States*, ... U. S. ....., 25 L. Ed. 2d 156, 161 (1970).

The principles thus stated by this Court this very year in a criminal case have long been equally applicable to civil actions.

"The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court . . . as a meritorious defense, in itself serving a public interest." *Guaranty Trust Co. of N. Y.* v. *United States*, 304 U. S. 126, 136 (1938).

"[I]t is a cardinal principle of modern law and of this court, that [statutes of limitations] are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious interest to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired." *Campbell* v. *City of Haverhill*, 155 U. S. 610, 617 (1895).

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation." *Wood* v. *Carpenter*, 101 U. S. 135, 25 L. ed. 807, 808 (1879).

Petitioners are not advancing a theoretical argument by stating their serious concern that memories may have faded and important witnesses may be missing or dead when they attempt to defend themselves now, under the decision below, against a complaint alleging "discrimination" which occurred, if at all, as long as twelve years before the complaint was filed. Nor do petitioners exaggerate their even more serious concern for their ability to adequately defend themselves against such allegations which, under the decision below, may be made for the next 35 years[17] and then reach back 37 years into the past.

One of petitioner's former officers who had some operating responsibilities is now deceased. While petitioners' two principal operating officers are now in the "prime of life," the *younger* will be 76 years old when petitioners are finally free from the exposure imposed by the Seventh Circuit, and the other will be in his nineties. Moreover, approximately 20% to 25% of petitioners' 1,300 houses were sold to buyers who were represented by counsel, and, to the best of petitioners' knowledge, *all* of those transactions more than five years before the complaint was filed were handled by and certain provisions in the contract negotiated for petitioners by their former attorney who is now deceased. The purpose of a statute of limitations is to secure the prompt enforcement of claims while witnesses are alive and their recollections unimpaired, and the decision of the Seventh Circuit is at war with the precept, repeatedly stated by this Court, that statutes of limitations should be favorably viewed and applied to effectuate repose and stability of past transactions.

For this reason, too, review by this Court is required.

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17. As recently as 1968, petitioners were entering into installment contracts with amortization periods of up to 32 years, and their exposure under the decision below will end five years after the last contract is amortized. In addition to this class action, petitioners face possible future actions by the purchasers of 1,074 homes, see Note 13, *supra*.

II.

The Decision Below Has Far-Reaching Implications for Other Civil Rights Litigation, Imposes a Harsh Penalty for Extending Credit for the Purchase of Property, and May Cause Serious Economic Consequences.

The Seventh Circuit in this case rendered the first decision (except that of the District Court) to consider the effect of long-term credit upon the statute of limitations applicable to a civil rights action for an allegedly "discriminatory" sale of property.

It is a matter of common knowledge that long-term credit is involved in practically every purchase and sale of a personal residence and the decision below may become authority for the maintenance of additional suits under 42 U. S. C. § 1982, both now and in the distant future against all in this country who sold to non-whites on credit, even though such sales occurred decades in the past. And this is equally true of credit in any form—an installment contract for deed as in the case at bar, a purchase money mortgage, a deed of trust, or any other arrangement. Anyone who extended credit, as did these petitioners, established a "continuing relationship" upon which the court below so strongly relied; anyone who receives periodic payments, as do these petitioners, during the duration of the credit arrangement, is "reaping the * * * benefit" alluded to by the Seventh Circuit as bearing upon the time when limitations begins to run. The prevalence of seller-provided financing of real property transactions in Illinois (see *Shay* v. *Penrose*, *supra*) indicates that a vast number of past transactions in Illinois may now be challenged under the authority of the Seventh Circuit's decision. The past use of contracts for deeds and purchase money mortgages throughout the entire United States creates the

possibility of so substantial an amount of litigation under 42 U. S. C. § 1982 as to give this question national importance.

Moreover, the Seventh Circuit's decision is applicable to future transactions in a manner threatening serious and far-reaching consequences, for the reasoning employed by the Seventh Circuit will be equally applicable not only to charges of violation of 42 U. S. C. § 1982, but in all future actions charging that a sale on credit violated the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968, 42 U. S. C. § 3604, and in all future actions charging that a loan itself violated the 1968 Act, 42 U. S. C. § 3605. Whenever a sale on credit or a loan is challenged under the 1968 Act, the very same reasoning which the Seventh Circuit used here to sweep aside the controlling five-year limitations period could also sweep aside the six-month period Congress provided in the 1968 Act:

> ". . . A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred. . . ." 42 U. S. C. § 3612(a).

Accordingly, the Seventh Circuit's decision can only have a chilling effect upon the willingness of the private sector to provide funds for financing real estate purchases, at the very time when there is already a shortage of such funds of near-crisis proportions. The prospect of facing civil rights suits for 25 years or more if one deals with a non-white on long-term credit will hardly be an inducement to engage in such transactions.

Many individuals, because of the scarcity of money, are now able to sell their own homes, perhaps their most sub-

stantial asset, only by themselves extending the credit almost all buyers require. The Seventh Circuit's decision, if permitted to stand, will mean that these individuals may sell to non-whites only for cash or by assuming exposure of intolerable duration to a civil rights suit under 42 U. S. C, § 1982. And the builders who themselves extend long-term credit to their customers, either through contracts of the type here involved, or through the use of purchase money mortgages, may elect to invest their capital in other ways rather than to assume decades of civil rights exposure for each sale on credit. As a result, housing starts may drop even farther than they have already dropped, and at a time when this nation faces the most serious housing shortage in its existence.

Obviously, the petitioners cannot speak for others. As for themselves, they started building in 1958 and since have built 1,300 brand new homes, most of which they sold on long-term credit to Negroes. They no longer are building homes.

For these reasons, too, review by this Court is required.

CONCLUSION.

Petitioners pray that this petition be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

UNIVERSAL BUILDERS, et al.,
Petitioners,

vs.

SIDNEY AND JULIA CLARK, et al.,
Respondents.

ACTION REALTY, et al.,
Petitioners,

vs.

CHARLES BAKER, et al.,
Respondents.

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

NOS. 1637, 1643

UNIVERSAL BUILDERS, et al.,

Petitioners,

vs.

SIDNEY AND JULIA CLARK, et al.,

Respondents.

ACTION REALTY, et al.,

Petitioners,

vs.

CHARLES BAKER, et al.,

Respondents.

BRIEF IN OPPOSITION

Respondents pray that the petitions for writs of certiorari filed in cases Nos. 1637 and 1643 be denied.

Since petitioners in case No. 1643 adopted as their argument the petition filed in case No. 1637, this single brief is filed in opposition to petitions filed in both cases. These cases were consolidated for argument in the Court of Appeals for the Seventh Circuit, and a single opinion was rendered by that Court.

QUESTIONS PRESENTED

1. Whether the courts below correctly decided that the Illinois statute of limitation on causes of action under 42 U.S.C. §1982 based upon racial discrimination in the price and terms of real estate instalment contracts, and upon subsequent discriminatory practices, which imposed a continuing inferior status on respondents and which inflicted continuing harm upon them, does not begin to run until the expiration of the contracts.

2. Whether the courts below correctly held in No. 1643 that the Illinois statute of limitation does not begin to run against respondents during the lifetime of the alleged conspiracy among petitioners to violate respondents' rights under 42 U.S.C. §1982.

REASONS FOR DENYING THE WRIT

1. There is no conflict among the circuits, and no holding concerning the commencement of statutes of limitation at variance with any decision of this Court.

2. Petitioners raise no claim of substantial injustice that might be suffered by them. Only if the ruling of the courts below was overturned would any injustice be suffered, and then only by respondents.

I.

THE DECISIONS OF THE COURTS BELOW REGARDING COMMENCEMENT OF THE STATUTE OF LIMITATION DO NOT CONFLICT WITH ANY RULING OF THIS COURT OR OF ANY OTHER CIRCUIT.*

These cases challenge discriminatory practices which directly impaired the rights of respondent Negroes to acquire and hold residential realty in Chicago, Illinois. Respondents have alleged that petitioners took unlawful advantage of Chicago's racially segregated housing market and discriminatory lending practices, and thereby perpetrated continuing wrongs upon respondents through the use of unconscionable contracts and the exaction of discriminatory prices and terms. In No. 1643, respondents have alleged the existence of a conspiracy among petitioners to fix prices and to violate respondents' rights under 42 U.S.C. §1982 and the federal anti-trust laws.

* Whether state statutes of limitation should be applied to bar respondents' claims under 42 U.S.C. §1982 is a separate question which is raised by respondents in their Petition for Certiorari, filed June 4, 1970. (No. 1653.)